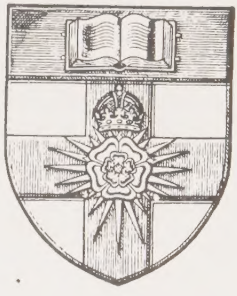
THIS BOOK
MUST NOT BE REMOVED
FROM THE LIBRARY

UNIVERSITY OF LONDON LIBRARY

346 Mx: North Gall.



UNIVERSITY OF LONDON
LIBRARY

Digitized by the Internet Archive
in 2026

https://archive.org/details/criminal-appeal-reports_1951-1952_35

THE

# CRIMINAL APPEAL REPORTS

WITH

## SUBJECT INDEX, TABLES OF CASES AND STATUTES CITED

JANUARY 15, 1951 TO FEBRUARY 25, 1952

EDITED BY

T. R. FITZWALTER BUTLER,

OF THE INNER TEMPLE AND MIDLAND CIRCUIT, BARRISTER-AT-LAW, RECORDER OF NEWARK

---

VOL. 35

---

LONDON:
SWEET AND MAXWELL, LIMITED,
2 & 3 CHANCERY LANE, W.C.2

TORONTO:
THE CARSWELL CO., LIMITED

SYDNEY, MELBOURNE, BRISBANE:
THE LAW BOOK CO. OF AUSTRALASIA PTY LIMITED

1952
*(Printed in England)*

BIBL. LONDIN UNIV.

This Volume should be cited as 35 Cr. App. R.

BIBL.
LONDIN.
UNIV.

# APPELLANTS AND APPLICANTS


| | PAGE |
|---|---|
| ALBURY, L. A. | 12 |
| Armstrong, R. D. | 72 |
| BALL, F. | 24 |
| Barker, J. J. | 20 |
| Barnett, S. J. | 37 |
| Burrows, B. P. T. | 180 |
| Bryan, H. J. | 121 |
| CARMELL, J. | 37 |
| Christ, L. E. E. | 76 |
| FUSSELL, E. G. | 135 |
| GARNHAM, G. B. | 37 |
| Gunewardene, S. R. | 80 |
| HALL, A. G. | 167 |
| Harris, F. H. | 185 |
| Harrison-Owen, E. M. | 108 |
| Heritage, L. | 45 |
| Higgins, F. | 130 |
| Homer, C. P. | 93 |
| LIPTON, J. | 37 |
| Loughlin, J. | 69 |
| Lovegrove, D. | 30 |
| Low, R. J. | 37 |
| Lumsden, R. J. | 57 |
| Lurie, C. | 113 |
| McCLELLAND, A. | 22 |
| Marquis, W. J. L. | 33 |
| Mayo, W. | 153 |
| PATEL, F. | 62 |
| Pearce, J. | 17 |
| Platt, S. W. | 37 |
| SECKEL, F. M. | 37 |
| Stobbart, J. | 125 |
| TILLY, F. W. | 37 |
| WHYBROW, A. G. | 141 |

# DIVISIONAL COURT CASES


| | PAGE |
|---|---|
| Beel *v.* Kelley | 128 |
| Credland *v.* Knowler | 48 |
| Fairclough *v.* Whipp | 138 |
| Mowe *v.* Perraton | 194 |
| Postmaster-General (H.M.) *v.* Whitehouse | 8 |
| R. *v.* Recorder of Grimsby; *Ex p.* Purser | 155 |
| Rose *v.* Matt | 1 |
| Shimmell *v.* Fisher & others | 100 |
| Stewart *v.* Chapman | 102 |
| Walters *v.* Lunt & another | 94 |


# CIRCUIT AND CENTRAL CRIMINAL COURT CASES


| | |
|---|---|
| R. *v.* Blanchard | 183 |
| R. *v.* Tronoh Mining Co. & others | 196 |
| R. *v.* Wood | 64 |

| | |
|---|---|
| Note on Procedure | 29 |
| Statement on Probation Orders | 207 |

# TABLE OF CASES

[*The letters* "R. *v.*" *in criminal cases are omitted*]


PAGE

ADDERLEY (1780) ..... 105, 106
Att.-Gen. *v.* Hitchcock (1817) 83

BAILEY (1924) ..... 171
Bellasis *v.* Hester (1698) .... 105
Bennett & Newton (1913) .. 29, 30
Bispham (1830) ..... 83
Blunt *v.* Heslop (1838) ..... 107
Bramley (1822) ..... 4
Brown & Hedley (1867) .. 80, 82, 87, 89
Burgess (1863) ..... 4

CARLOS *v.* BROOK (1804) .... 89
Castle *v.* Burditt (1790) .. .. 106
Castro (1879); affirmed on appeal (1883) ..... 123
Clarke *v.* Periam (1742) .. .. 83
Cohen & Bateman (1909) .. 141, 150, 151
Cole (1941) ..... 63, 65, 176
Creamer (1918) ..... 94–6, 98

DAVISON (1808) ..... 82
Dawson *v.* McKenzie (1908) .. 48, 52, 55, 57
De La Motte (1781) ..... 88
Dyson (1943) ..... 72, 74

EASTERN ARCHIPELAGO (1853) .. 37, 38, 42, 43

FARID (1945) ..... 143
Fissington *v.* Hutchinson (1886) 129
Fripp & Jones (1942) ..... 143

GOLDSMITHS CO. *v.* METROPOLITAN RY. CO. (1903) .. 102, 105, 107
Greenberg (No. 2) (1943) .... 13

HAGGERSTON CASE (1896) .... 206
Hall (1891) ..... 37, 38, 42, 43
Hastings & Folkestone Glassworks, Ltd. *v.* Kalson (1948) 135–7

PAGE

Hammond (1941) ..... 63, 65
Hornby (1946) ..... 17–20

JONES (1809) ..... 83
Jones (1896) ..... ..... 17–20
Jones *v.* Thomas (1934) .. 48, 51, 52, 55, 57

KAKELO (1923) ..... 37, 38, 42
Kennington Case (1886) ..... 206

LAYER (1722) ..... 83
Leary (1942) ..... 184
Lester *v.* Garland (1808) .... 105–7
Lock (1872) ..... 139, 140

MCCANN (1911) ..... 157, 161, 162
Makin *v.* Att.-Gen. for New South Wales (1893) .. 109, 170, 171
Mawson *v.* Hartsink (1802) .. 82, 87, 89
Middlesex Justices; *Ex p.* Director of Public Prosecutions (1950) ..... 158, 163
Morris (1950) .... 121, 122, 131–4

NOOR MOHAMED *v.* R. (1949) .. 169, 176
Norfolk Justices; *Ex p.* Director of Public Prosecutions (1950) ..... 158

PARKIN (1949) ..... 58, 60
Parry & others (1950) ..... 22
Prince (1868) ..... 24, 25, 27–8

RAWLINGS *v.* GENERAL TRADING CO. (1921) ..... 38, 41
Rookwood (1696) ..... 83
Rowton (1865) ..... 82, 87, 88
Rudge (1805) ..... 147
Russell *v.* Ledsam (1845) .. 107, 108

SHARMAN (1913) ..... 29, 30
Sharpe *v.* Scoging (1817) .... 82

PAGE

Sims (1946) ..... 167–9, 179
Sherman (H.), Ltd. (1949) .. 29
Shropshire Justices (1838) .. 107
Smith (1915) ..... 112
Smith & others (1950) .. 114, 115, 117
Stebbings *v.* London & N.-W. Ry. Co. (1899) ..... 82
Stirland *v.* Director of Public Prosecutions (1944) .... 141, 142, 151, 152

Thompson *v.* Director of Public Prosecutions (1917) 67, 109, 168, 176, 177, 179, 187, 192
Turner (1909) ..... 157, 160–2
Turner (1944) ..... 110

PAGE

Underwood (A. L.), Ltd. *v.* Bank of Liverpool, Ltd. (1924) ..... 118

Vallett (1950) ..... 34

Watson (1817) ..... 80, 82, 89
Webb *v.* Fairmaner (1838) ... 106
Webster (1861) ..... 4
Wilkes (1769) ..... 12, 14, 15
Wilkinson (1821) ..... 1, 4, 7
Woolmington *v.* Director of Public Prosecutions (1935) .. 151, 152

Young *v.* Higgon (1840) .... 106

Zielinski (1950) ..... 63, 65

# TABLE OF STATUTES


PAGE

1822. 3 Geo. 4, c. 114 (Hard Labour Act) (rep.) ..... 132
1824. 5 Geo. 4, c. 83 (Vagrancy Act) ..... 140
1827. 7 & 8 Geo. 4, c. 28 (Criminal Law Act) ..... 14
s. 10 ..... 13
1843. 6 & 7 Vict. c. 18 (Parliamentary Registration Act), s. 51 (rep.) 43
1851. 14 & 15 Vict. c. 19 (Prevention of Offences Act) ..... 147
14 & 15 Vict. c. 100 (Criminal Procedure Act) ..... 132
1861. 24 & 25 Vict. c. 100 (Offences against the Person Act),
s. 14 ..... 132
s. 15 ..... 132, 147
s. 21 ..... 132
s. 62 ..... 128
1865. 28 & 29 Vict. c. 18 (Criminal Justice Act), s. 6 ..... 89
1872. 35 & 36 Vict. c. 66 (Bastardy Laws Amendment Act), s. 4 .. 56
1879. 42 & 43 Vict. c. 49 (Summary Jurisdiction Act),
s. 17 ..... 137
s. 31 (iv) ..... 10
1885. 48 & 49 Vict. c. 69 (Criminal Law Amendment Act),
s. 4 ..... 132
s. 5 ..... 132
s. 11 ..... 17–19, 180
1889. 52 & 53 Vict. c. 63 (Interpretation Act),
s. 1 (1) (*b*) ..... 204
s. 17 (1) ..... 205
s. 26 ..... 104
1891. 54 & 55 Vict. c. 69 (Penal Servitude Act), s. 1 (2) ..... 133
1898. 61 & 62 Vict. c. 36 (Criminal Evidence Act), s. 1 ..... 108
1907. 7 Edw. 7, c. 23 (Criminal Appeal Act),
s. 3 (*b*) ..... 17, 109
s. 4 (1) ..... 110, 141, 150
s. 16 ..... 113
s. 19 (*a*) ..... 12, 13
1908. 8 Edw. 7, c. 15 (Costs in Criminal Cases Act), s. 6 (5) .... 23
8 Edw. 7, c. 59 (Prevention of Crime Act) (rep.) ..... 162
1914. 4 & 5 Geo. 5, c. 12 (Aliens Restriction Act), s. 1 (2) .... 42, 43
4 & 5 Geo. 5, c. 58 (Criminal Justice Administration Act),
s. 16 (rep.) ..... 133
1915. 5 & 6 Geo. 5, c. 90 (Indictments Act),
s. 4 ..... 172
s. 5 (3) ..... 188
Sched., rule 3 ..... 172
1916. 6 & 7 Geo. 5, c. 50 (Larceny Act),
s. 1 (1) ..... 5, 94, 98, 101
s. 1 (2) (iii) ..... 1–7
s. 2 ..... 1, 2, 94
s. 28 (4) ..... 57–9
s. 32 (1) ..... 24, 26, 113–5, 117
s. 33 (1) ..... 94
s. 33 (3) ..... 94, 96
s. 36 ..... 97

PAGE

1919. 9 & 10 Geo. 5, c. 92 (Aliens Restriction (Amendment) Act), s. 13 (4) ..... 43
1925. 14 & 15 Geo. 5, c. 86 (Criminal Justice Act), s. 24 ..... 135, 137
s. 33 (1) ..... 29
Sched. II (17) ..... 135, 137, 138
1927. 17 & 18 Geo. 5, c. 12 (Auction (Bidding Agreements) Act), s. 1 ..... 37–41
1930. 20 & 21 Geo. 5, c. 43 (Road Traffic Act), s. 12 ..... 103
s. 21 ..... 102–4
s. 28 (1) ..... 100, 101, 135, 136, 194–6
1933. 23 Geo. 5, c. 12 (Children and Young Persons Act), s. 38 (1) ..... 48, 53
s. 50 ..... 94, 96, 97
23 & 24 Geo. 5, c. 36 (Administration of Justice (Miscellaneous Provisions) Act), s. 1 ..... 29
23 & 24 Geo. 5, c. 38 (Summary Jurisdiction (Appeals) Act), s. 1 ..... 10
1948. 11 & 12 Geo. 6, c. 19 (Attempted Rape Act) ..... 132
11 & 12 Geo. 6, c. 58 (Criminal Justice Act), s. 3 ..... 208
s. 7 (1) ..... 22, 125
s. 8 ..... 209
s. 12 (1) ..... 125–7
s. 13 ..... 22
s. 20 (1) ..... 155, 159, 160, 162
s. 20 (3) ..... 135, 136, 155–7
s. 20 (4) ..... 159
s. 20 (5) ..... 157–9, 162, 164
s. 20 (7) ..... 155, 156
s. 21 (1) ..... 45, 46, 125–7
s. 21 (2) ..... 12
s. 22 ..... 93, 94, 153–5
s. 29 (1) ..... 8–10, 20–1, 33–4
s. 37 (1) ..... 8–11
s. 52 ..... 15
Sched. III (1) ..... 15, 93
1949. 12, 13 & 14 Geo. 6 (Representation of the People Act), ss. 60–78 ..... 205
s. 63 (1) ..... 197, 202, 203, 205
s. 171 (1) ..... 205

[DIVISIONAL COURT CASE]

BEFORE

THE LORD CHIEF JUSTICE AND MR. JUSTICE DEVLIN.

---

## ROSE *v.* MATT.

1951.
Jan. 19.

*Larceny—Theft by Owner of own Goods—Bailee having Special Property—Intent Permanently to Deprive Bailee of Special Property—No Intent to Charge Bailee—Bailee not Rendered Chargeable—Larceny Act*, 1916 (6 & 7 *Geo.* 5, *c.* 50), *s.* 1 (2) (iii).

A person may be convicted of stealing his own goods, if such goods are in the possession of a bailee who has a special property in them and a right to possession of them as against the defendant, and the intention of the defendant in taking the goods out of the possession of the bailee is fraudulently to deprive the bailee permanently of his special property in them. It is not necessary that the defendant should intend to charge the bailee with the loss of the goods or that the taking should have the effect of charging the bailee.

WILKINSON (1821), R. & R. 470, considered.

Case stated by Stamford borough justices.

At a Court of summary jurisdiction at Stamford an information was preferred by the appellant Thomas Rose, superintendent of police, under section 2 of the Larceny Act, 1916, charging the respondent, Peter John Matt, with between August 26 and September 1, 1950, feloniously stealing a travelling clock of the value of £3, the property of Theophilus John Simpson.

On the hearing of the information the following facts were proved or admitted. Theophilus John Simpson carried on business as a woodworker at North Street, Stamford, where he had a shop with a workshop at the rear. The respondent was a packer and lived in Stamford.

On August 26, 1950, the respondent called at Simpson's

1951.
*Jan.* 19.

ROSE *v.* MATT.

Goddard, L.C.J., Devlin, J.

shop and inquired about a model aircraft engine and accessories, of the total value of £2 10s., which Simpson had in stock. The respondent stated that he had not got the money and Simpson informed him that he would accept a deposit of £1. The respondent then left the shop without the goods.

Later the same day the respondent again called at the shop, gave a false name and address, and produced a travelling clock which belonged to him and which he asked Simpson to accept as security for the aforementioned goods. Simpson agreed to do so and informed the respondent that, if he had not brought the money within one month, he would sell the clock. The respondent then took the goods away and was given a copy of the account for the amount due from him.

Simpson put the clock on a table in the showroom above the shop and last saw it there that evening. He next returned to the shop on Thursday morning, August 31, and found the clock was missing.

On a day during the end of August, 1950, the respondent called at the shop and saw in the showroom Simpson's mother. He inquired about an engine, which Mrs. Simpson could not find, and left after buying some engine parts. Mrs. Simpson did not know that the clock was in the showroom and did not see the respondent take it.

When subsequently interviewed by the police, the respondent admitted that he had taken the clock from the showroom when Mrs. Simpson was not looking and added "I took it because I thought he would sell it. It was wrong that I took it. I should have left it there until I had paid what I owed him". The respondent then handed the clock back to the police.

On behalf of the appellant it was contended: (i) that Simpson was the "owner" of the clock within the definition contained in section 1 (2) (iii) of the Larceny Act, 1916, which defines "owner" as including "any person having possession or control of, or a special property in, anything capable of being stolen"; (ii) that the respondent was guilty of an offence under section 2 of the Act.

1951. *Jan.* 19.

ROSE *v.* MATT.

Goddard, L.C.J., Devlin, J.

On behalf of the respondent it was contended: (i) that the clock was lodged by him with Simpson as security, that the property in the clock remained in the respondent and Simpson had a special interest in the clock, but the respondent remained the owner as between him and Simpson and could not be convicted of stealing his own property; (ii) that the definition of "owner" within the meaning of section 1 (2) (iii) of the Larceny Act, 1916, was intended to apply to cases of theft by a third party from the bailee or other person not possessor and did not affect the position between the owner, in the common law meaning of the word, and the bailee; (iii) that an owner who had parted with the possession of property, as in these circumstances, could not be convicted of larceny unless it could be established that the bailee had thereby become chargeable.

The justices were of opinion that, although Simpson was the "owner" within the meaning of the definition contained in section 1 (2) (iii) of the Larceny Act, 1916, the respondent, in taking the clock from the shop, did not intended to charge the bailee with its loss, nor was there any evidence to show that the taking of the clock had the effect of charging the bailee, and on that ground they dismissed the information.

The prosecutor appealed.

*T. R. Fitzwalter Butler*, for the appellant.

The justices took too narrow a view of the law. There is no recent authority on the point, but it is submitted that the present law is correctly stated in *Halsbury's Laws of England* (2nd ed.), tit. "Criminal Law", Vol. IX, p. 506, art. 864: "A man may be convicted of stealing his own goods, if such goods are in the possession of his bailee, and the intention of the accused is either fraudulently to charge the bailee with the loss of the goods or, in cases where the bailee has a right to possession as against the accused, to deprive the bailee of his special property in the goods". It is quite true that in the old authorities there are references to the bailee being made chargeable or accountable for the loss as the result of the taking; but

1951. *Jan.* 19.

ROSE *v.* MATT.

Goddard, L.C.J., Devlin, J.

even in the case on which the justices appear to have relied, WILKINSON (1821), R. & R. 470, it would appear that the majority of the Judges of the Court for Crown Cases Reserved regarded an intent dishonestly to deprive the bailee permanently of his special property in the article bailed as sufficient, and the reference to the fact that the taking in that case rendered the bailees liable to the Customs in a suit on their bond may be regarded merely as evidence of their special property or of the fraudulent intent. [He referred also to BRAMLEY (1822), R. & R. 478; WEBSTER (1861), L. & C. 77 and BURGESS (1863), L. & C. 299.] Before the definition of "owner" contained in section 1 (2) (iii) of the Larceny Act, 1916, there was no clear authority on the question who would be regarded as an "owner", when a person removed his own goods which for the time being were in the lawful possession or control of a bailee, and the references in the old cases to the effect of the act rendering the bailee chargeable or accountable may be regarded only as establishing that he had a sufficient special property in the goods to constitute him an owner. No such limitation should now be read into the very wide words of the present statutory definition.

The respondent did not appear.

THE LORD CHIEF JUSTICE: This is a case stated by justices for the borough of Stamford and it raises what appears to be a new point in the law of larceny, but only a new point in the sense that there does not seem to be a case which precisely covers the point, although I think for all essential purposes our decision is founded on the same lines as those which upheld the conviction for larceny in WILKINSON (1821), R. & R. 470. We have now to decide this case in 1951, having the advantage of the definitions contained in the Larceny Act, 1916.

The Larceny Act, 1916, is entitled: "An Act to consolidate and simplify the law relating to larceny triable on indictment and kindred offences", and we have now only to look at the Act to find what amounts to larceny. The old cases may be of assistance in the construction of the Act, but if the words of

the Larceny Act, 1916, are clear, that Act governs the decision which this Court must now give.

The case is one in which the respondent is charged with stealing his own goods. The facts are that he handed a clock, which undoubtedly was his own property, as security to a person of the name of Simpson, to whom he was owing money. The respondent had desired to buy some goods from Simpson and had first been asked for a deposit of a pound on those goods and, subsequently, wanting to get the goods from Simpson, he took the travelling clock, which is the article he is charged with stealing, and asked Simpson to accept it as security. Simpson agreed to accept the travelling clock as security and informed the respondent that if he did not bring the money within a month he (Simpson) would sell the clock. That is the essential matter in this case, that the respondent deposited the clock with Simpson as security for a debt. He then returned to the shop on a subsequent occasion, when Simpson was not there, and fraudulently—there is no question about that—took possession of the clock and took it away. When interviewed by the police, he admitted that he had done it and said that he had taken the clock away because he did not want Simpson to sell it. In other words, Simpson had what the law calls special property in that clock; he had the right to hold it as security. It was deposited with him on the terms that if the defendant did not pay the money that he was owing within a month Simpson might sell the clock, and by taking it away from Simpson within the month the respondent was depriving, and intended to deprive, Simpson of his special property, because he intended to prevent him from exercising the right he would otherwise have had of selling that clock.

The Larceny Act, 1916, s. 1, defines larceny in this way: "A person steals who, without the consent of the owner, fraudulently and without a claim of right made in good faith, takes and carries away anything capable of being stolen with intent, at the time of such taking, permanently to deprive the owner thereof". Then, section 1 (2) (iii): "The expression

1951.
*Jan.* 19.

ROSE *v.* MATT.

Goddard, L.C.J., Devlin, J.

' owner ' includes any part owner, or person having possession or control of, or a special property in, anything capable of being stolen ".

It appears to me that it is quite clear that Simpson had a special property in the clock and that the defendant intended permanently to deprive Simpson of that special property, because he took back that which he had left with him as security, and he took it back during the time within which Simpson was entitled to hold it with a view to selling it if the money had not been paid within that time.

The justices, who evidently have given great attention to this case and were asked to come to a conclusion on a matter in which authority, which perhaps is not as clear as it might be, was cited to them, took the view that the respondent's act was not larceny, because they found that he did not take the clock with the intention of thereafter making a fraudulent charge against Simpson of having converted the clock or having refused to return it. If a bailee either refuses to return goods bailed to him or is unable to produce them and cannot show that he lost them without negligence, the owner can maintain an action against him. It is no doubt perfectly clear that many of the old cases which discuss the question whether in these circumstances an owner is guilty of larceny have been decided on the ground that he took the goods with the intent of fraudulently charging the bailee in an action of detinue. For instance, in *Hale's Pleas of the Crown*, Vol. I, page 513. one finds this passage: " If A bail goods to B and afterwards *animo furandi* steals the goods from B with design probably to charge him for them in an action of detinue, this is felony "; and the justices in this case took the view that, as they were satisfied that the defendant did not intend to charge Simpson for the goods, that is to say, to bring an action against him if the clock was not forthcoming at the end of the month, it was not felony. They were referred to the case I quoted at the beginning of my judgment, WILKINSON (*supra*), which was a case which had been reserved for the opinion of all the Judges. That was a case in which the owners of goods, intending to deprive the

Revenue of duties, put some goods on a boat for the purpose of having the goods taken to a ship, the boat belonging to a firm of lightermen, and then fraudulently took the goods back out of the custody of the lightermen. It was held to be larceny and the majority of the Judges held that it was larceny " because Marsh & Co. [the lightermen] had a right to the possession until the goods reached the ship; they had also an interest in that possession, and the intent to deprive them of their possession wrongfully and against their will, was a felonious intent as against them, because it exposed them to a suit upon the bond ". It might have exposed them to a suit upon the bond, but whether or not the defendants intended to expose them to a suit upon the bond does not seem to have been the governing consideration; and in any case it seems to me that, now the law has been clarified by the Larceny Act, 1916, it is quite clear that an owner of goods who has entrusted them to another in such circumstances that that other person has a special property in the goods is guilty of larceny if he fraudulently takes them away from that person. There is no question here that the defendant was acting fraudulently; he was acting dishonestly, and so the justices have found.

I think, therefore, that this case must go back to the justices with an intimation that this case is covered by section 1 (2) (iii) of the Larceny Act, 1916, and that in the circumstances proved in this case the respondent was guilty of larceny and that therefore they must convict.

DEVLIN, J.: I agree.

*Appeal allowed.*

*Case remitted with direction to convict.*

---

*Solicitors*: Vizard, Oldham, Crowder & Cash, agents for T. Norton, Son & Hamilton, Grantham, for the appellant.

[DIVISIONAL COURT CASE]

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HUMPHREYS AND MR. JUSTICE DEVLIN.

1951
Jan. 23.

## H.M. POSTMASTER-GENERAL *v.* WHITEHOUSE.

*Bail—Committal to Quarter Sessions for Sentence—Appeal against Conviction before Magistrates—Jurisdiction of High Court—Observations on Bail for Persons with Criminal Records—Criminal Justice Act*, 1948 (11 & 12 *Geo.* 6, *c.* 58), *ss.* 29, 37 (1) (*a*).

By section 29 of the Criminal Justice Act, 1948, a person committed by a Court of summary jurisdiction for sentence to a Court of quarter sessions is to be committed "in custody". By section 37 (1) of the Act: "Without prejudice to the powers vested before the commencement of this Act in any court to admit or direct the admission of a person to bail—(*a*) the High Court may release from custody a person who has given notice of appeal to a court of quarter sessions against a conviction or sentence of a court of summary jurisdiction, on his entering into a recognisance conditioned for his appearance at the hearing of the appeal".

Where a person has been convicted before magistrates and committed to quarter sessions for sentence under section 29 of the Criminal Justice Act, 1948, and has given notice of appeal to quarter sessions against his conviction, the High Court has power under section 37 (1) (*a*) of the Act to admit him to bail, but the power should be exercised with extreme care, and only in exceptional cases, regard being had especially to the question whether the applicant has a long record of previous convictions.

Observations on the undesirability of admitting to bail persons who have long records of previous convictions.

Summons for bail referred by Barry, J., to the Divisional Court.

The applicant, Albert Whitehouse, was convicted by the stipendiary magistrate of Liverpool on January 9, 1951, of

1951.
*Jan.* 23.

H.M. POSTMASTER-GENERAL *v.* WHITEHOUSE.

Goddard, L.C.J., Humphreys, J., Devlin, J.

receiving a postman's uniform and other clothing, the property of H.M.'s Postmaster-General. Having regard to the applicant's antecedents the magistrate was of opinion that the sentence which he had power to pass was inadequate, and committed the applicant to Liverpool Quarter Sessions for sentence under section 29 of the Criminal Justice Act, 1948. On the following day the applicant gave notice of appeal to quarter sessions against his conviction and applied by summons to the Judge in Chambers for bail. Barry, J., in view of the importance of the question involved, referred the matter to the Divisional Court.

*G. R. F. Morris*, for the applicant:

*J. G. Burrell*, for the prosecution.

THE LORD CHIEF JUSTICE: This matter, which has been referred to the Court by the learned Judge in Chambers with a view to a decision being given in public and not merely in Chambers, raises a question of considerable importance. Under the new provisions in the Criminal Justice Act, 1948, a person convicted by a Court of summary jurisdiction can, by section 29, be committed for sentence to Quarter Sessions if justices, after conviction, obtain information as to his character and antecedents and then form the opinion "that they are such that greater punishment should be inflicted in respect of the offence than that Court has power to inflict". In that case the Court is to commit him in custody to Quarter Sessions for sentence. It is abundantly clear, therefore, that where justices think fit to exercise their powers under section 29, they have no power to grant bail. But it is said that the High Court has power to grant bail because of the provisions of section 37 (1) (*a*). I am bound to say that, contrary to an opinion which I formerly formed but did not express, I think that the argument of Mr. Morris is right. Section 37 begins by saying: "Without prejudice to the powers vested before the commencement of this Act in any Court to admit or direct the admission of a person to bail—(*a*) the High Court

1951. *Jan.* 23.

H.M. POSTMASTER GENERAL *v.* WHITEHOUSE.

Goddard, L.C.J., Humphreys, J., Devlin, J.

may release from custody a person who has given notice of appeal to a Court of Quarter Sessions against a conviction or sentence of a Court of summary jurisdiction, on his entering into a recognisance conditioned for his appearance at the hearing of the appeal ". Those words are very wide and give power to the High Court to release from custody a person who has given notice of appeal against conviction. What impresses me most is this, that even before that section was passed a person who had been convicted and sentenced by a Court of summary jurisdiction could have served notice of appeal and applied for bail under section 31 of the Summary Jurisdiction Act, 1879, as substituted by section 1 of the Summary Jurisdiction (Appeals) Act, 1933, because there is an express provision there (sub-section (iv)) that the justices can release him on bail if they see fit. There is no doubt that if justices refuse to admit a man to bail he can always appeal to this Court, and therefore it looks as though the one case in which it was necessary expressly to confer a power on the High Court to release from custody a person who has given notice of appeal against a conviction is the case where he has after conviction been committed for sentence under section 29, where the justices have no power to grant bail. On the words of section 37 (1) (*a*) it appears to me that the High Court has power to entertain an application. It is obviously a power which ought to be exercised with extreme care, and I sincerely hope only in really exceptional cases, because, Parliament having provided that a man is to be committed in custody for sentence to Quarter Sessions, it certainly is very curious that they have apparently given this right of appeal under clause (*a*) of section 37 (1) and have not in that sub-section made any reference to section 29. But inasmuch as the words of section 37 (1) (*a*) are so wide and provide that the High Court may release a person who has given notice of appeal against conviction, it seems to us impossible to say that the High Court has not been given power to release a person who has been convicted and committed for sentence under section 29 of the Criminal Justice Act, if a notice of appeal to Quarter Sessions has been given.

1951. *Jan.* 23.

H.M. POSTMASTER-GENERAL *v.* WHITEHOUSE.

Goddard, L.C.J., Humphreys, J., Devlin, J.

We are of opinion that in these circumstances the convicted person has a right to apply to the High Court for bail. The Court will exercise the power with extreme care and will require to see what is the prisoner's previous history of convictions, because, as we have pointed out in cases in the Court of Criminal Appeal, bail ought to be sparingly granted in cases where prisoners have long records of convictions, since it very often results, when such a person obtains bail, he commits offences while on bail, sometimes telling the Court afterwards that he did it so as to get money to enable him to be represented at Quarter Sessions, in other cases saying that he had to make some provision for his wife and children while he was in prison. We have pointed that out in the Court of Criminal Appeal on more than one occasion. In our opinion, however, under section 37 (1) (*a*) the Court has power to entertain this application. For the moment that is all we are deciding.

HUMPHREYS, J.: So far as I am concerned, my Lord has given the judgment of the Court.

DEVLIN, J.: I agree.

[*Counsel for the applicant addressed the Court on the merits, as the result of which the application was refused.*]

*Application refused.*

*Solicitors:* Mawby, Barrie & Letts, agents for Silverman & Livermore, Liverpool, for the applicant; The Solicitor, General Post Office, for the prosecution.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HUMPHREYS AND MR. JUSTICE DEVLIN.

1951.
*Jan.* 29.

## LEONARD ALFRED ALBURY.

*Sentence—Corrective Training—Sentence to Commence at Expiration of Existing Sentence—Criminal Justice Act*, 1948 (11 & 12 *Geo.* 6, *c.* 58), *s.* 21 (2).

Since corrective training is a discretionary sentence, there is no objection in law to the passing of a sentence of corrective training to commence on the expiration of an existing sentence of corrective training.

WILKES (1770), 19 St. Tr. 1075, applied.

Where, however, the prisoner had been sentenced to two years' corrective training, and while serving that sentence disclosed other offences for which he was brought up and sentenced to a further period of two years' corrective training, to commence at the expiration of the existing sentence,

*Held*, that, in the circumstances of the case, and in view of the fact that, unless in quite exceptional circumstances, a sentence of corrective training should be for a period of not less than three years, the Court would give effect to the principle by varying the second sentence to one of two years' and eight months' corrective training, to run concurrently with the first sentence, which would enable the prisoner to be discharged at the same date as if he had received one sentence of three years' corrective training.

Reference by the Home Secretary under section 19 (*a*) of the Criminal Appeal Act, 1907.

The appellant was convicted at Middlesex Sessions on November 3, 1949, of burglary and larceny and sentenced by the Deputy Chairman to two years' corrective training. While serving the sentence he disclosed other offences which he had committed, and in respect of these he was convicted of larceny at Middlesex Sessions on October 2, 1950, and was sentenced by the Deputy Chairman to a further period of two years'

1951.
*Jan.* 29.

LEONARD ALFRED ALBURY.

Goddard, L.C.J., Humphreys, J., Devlin, J.

corrective training, to commence at the expiration of the existing sentence.

*Michael Havers*, for the appellant:

There is no doubt that a sentence of imprisonment can be passed to commence at the expiration of an existing sentence. This was so law at common law in the case of misdemeanours: WILKES (1770) 19 St. Tr. 1075, and has been so in the case of felony since the passing of the Criminal Law Act, 1827, by virtue of section 10. [He referred also to GREENBERG (No. 2), 29 Cr. App. R. 51; [1943] K. B. 381.] Corrective training, however, is a new form of sentence and is subject to the provisions of the Third Schedule of the Criminal Justice Act, 1948, with regard to release on licence, and difficulties would occur in giving effect to those provisions if consecutive sentences were to be permitted. Even if consecutive sentences are permissible in law, they should not have been passed in the circumstances of this case.

*J. H. Buzzard*, for the Crown:

There is nothing in law to prevent consecutive sentences of corrective training being imposed any more than consecutive sentences of imprisonment. It is, of course, a matter for the consideration of this Court whether consecutive sentences were proper in the present case.

THE LORD CHIEF JUSTICE: This is a reference by the Home Secretary to this Court under section 19 (*a*) of the Criminal Appeal Act, 1907, and under those provisions the Court has the same powers as if it were dealing with an appeal. Two questions arise: one a question of law, namely, whether a second sentence of corrective training can be passed to follow an existing sentence of corrective training, and the other a question of discretion, whether the sentence passed in this case should be altered.

With regard to the first point, this Court does not feel any difficulty. Mr. Havers very properly called our attention to

1951.
*Jan.* 29.

LEONARD ALFRED ALBURY.

Goddard, L.C.J. Humphreys, J., Devlin, J.

such cases as there may be and to the statutes on the subject, but we think that at common law the position was clearly indicated in WILKES' CASE (1770), 19 St. Tr. 1075. From a perusal of that case it emerges that the Judges who were consulted by the House of Lords were being asked, "as to whether a judgment of imprisonment against a defendant, to commence from and after the determination of an imprisonment to which he was before sentenced for another offence, was good in law". As is well known, Wilkes was before the Court on a charge of misdemeanour and in those days the judgment which was passed by the Court for treason or felony was death. The Judges, therefore, in giving their judgment, pointed out the difference between treason and felony and misdemeanour, because in the case of felonies there was a definite sentence, namely, that of death, and so no question could arise of passing successive sentences. If a man had been sentenced to be hanged, there was no point in sentencing him again to be hanged. In the case of a misdemeanour the sentence was discretionary. The answer of the Judges to the question propounded by the House of Lords was (p. 1136), "that a judgment of imprisonment against a defendant, to commence from and after the determination of an imprisonment to which he was before sentenced for another offence, is good in law".

The alteration that was made in the law by the Criminal Law Act, 1827 (7 & 8 Geo. 4, c. 28), which enabled, on a conviction of felony, a sentence to be tacked on to a sentence which the prisoner was already serving, was due to the fact that by that time the series of Acts of Parliament which mitigated the rigours of the criminal law had already begun to be passed, and instead of sentence of death for felonies there were, by this time, many cases where sentences of imprisonment or transportation could be passed. We feel no doubt, therefore, that where a sentence is a discretionary sentence—and a sentence of corrective training is a discretionary sentence—the principle to be applied is exactly the same as was applied in cases of misdemeanours in Wilkes' day. The distinction is not some

1951.
*Jan.* 29.

LEONARD ALFRED ALBURY.

Goddard, L.C.J., Humphreys, J., Devlin, J.

artificial distinction between felonies and misdemeanours. The distinction is that whereas in WILKES' CASE (*supra*) there was no discretion in the case of felonies, now there is a discretion both in felonies and misdemeanours. Therefore, as the sentence of corrective training is discretionary, we see no reason in law why it should not be possible to impose a sentence of corrective training to follow immediately after a sentence of corrective training already being served.

One point to which Mr. Havers called our attention was that in the Third Schedule to the Criminal Justice Act, 1948, which was the Act which first enabled the sentence of corrective training to be passed, it is provided: "The Prison Commissioners may release on licence a person sentenced to corrective training or preventive detention after he has served such portion of his sentence as may be determined in accordance with rules made under section 52 of this Act". But that is only putting sentences of corrective training and preventive detention on the same footing as sentences of imprisonment, that is to say, that when two-thirds of the sentence has been served, if the prisoner has behaved himself in prison, he may be released, and when he is released then he has to report in such circumstances and to such persons as are laid down in the Act. But we do not see that that provision, which is exactly the same in the case of a person sentenced to corrective training as in the case of a person sentenced to imprisonment, really raises any difficulty. If the prisoner earns the one-third remission to which he would become eligible, his second sentence would then begin to run.

Our conclusion, therefore, is that there is no objection in law to passing a sentence of corrective training to follow an existing sentence of corrective training, and the authorities will deal with a prisoner so sentenced in exactly the same way as they would deal with a prisoner who had received two consecutive sentences of imprisonment at two different times.

Now comes the question whether we should interfere with the sentence. The prisoner was first sentenced, on November 3, 1949, to two years' corrective training. He had then ten

1951.
*Jan.* 29.

LEONARD ALFRED ALBURY.

Goddard, L.C.J., Humphreys, J., Devlin, J.

previous convictions against him. This Court has said on several occasions lately, and we desire to repeat what we have said on those occasions, that, as a general rule, it is desirable that a sentence of corrective training should be for not less than three years. A three years' sentence of corrective training means, in effect, that the prisoner will be confined, if he behaves himself, only for two years, and it is quite impossible to suppose that any real reform can be effected in less than that time. The Judges have had the advantage of knowing what are the views of the Prison Commissioners, and also the governors of certain prisons, and they are all unanimously of the opinion that, if a sentence of corrective training is to be of any real benefit, it should never be for less than three years, unless there are some quite exceptional circumstances.

We have no power in this case to interfere by way of increasing the first sentence that was passed upon the prisoner. What happened was that, after he had been sentenced to two years' corrective training, he thought that he would like to make a clean breast of other offences he had committed, so that he could be certain of a clean sheet when he came out. He disclosed several other offences which he had committed, which resulted in another sentence of corrective training for two years being passed upon him. No doubt he feels some grievance, because the other offences came to light only owing to his own confession, that his sentence should be doubled.

The Court has decided to alter the sentence passed upon the prisoner on the second occasion so that the term that he will serve will be equivalent to what he would have served if he had been sentenced to three years on the first occasion, and will do it by altering the sentence that was passed on the second occasion to one of two years' and eight months' corrective training, to run concurrently with the first sentence. That will cause his discharge if he behaves himself in prison, to take place at the same time as if he had been sentenced to three years in the first instance.

*Sentence varied.*

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HUMPHREYS AND MR. JUSTICE DEVLIN.

## JOHN PEARCE.

1951.
*Jan.* 31.

*Gross Indecency between Males—One Person only Charged with Attempt—Other Party Witness for Crown Giving Evidence of Non-Consent—Validity of Charge—Joint Charge—Possibility of One Defendant being Acquitted and other Convicted—Criminal Law Amendment Act*, 1885 (48 & 49 *Vict. c.* 69), *s.* 11.

The appellant was convicted of attempting to commit an act of gross indecency with F. F. was not charged, but gave evidence for the Crown that he did not consent to any indecency.

*Held*, that the conviction was proper in law.

HORNBY (1946), 32 Cr. App. R. 1, distinguished.

Where two persons are jointly charged with an offence under s. 11 of the Criminal Law Amendment Act, 1885, there is no rule of law that it is impossible for one to be acquitted and the other convicted.

JONES, [1896] 1 Q. B. 4, followed.

If, however, both of the persons charged with such an offence are to be convicted, there must be a proper direction to the jury in the case of each person that he must be proved to have committed the offence with the other person.

HORNBY (*supra*) applied.

Appeal against conviction (on certificate).

The appellant was convicted at the Central Criminal Court on Nov. 21, 1950, of attempting to commit an act of gross indecency with another male person and was sentenced by the Recorder of London to six months' imprisonment.

The other person was not charged, but was called as a witness for the Crown and gave evidence that he did not consent to any indecency. The Recorder of London gave a certificate under section 3 (*b*) of the Criminal Appeal Act, 1907,

1951.
*Jan.* 31.

JOHN PEARCE.

Goddard, L.C.J., Humphreys, J., Devlin, J.

on the questions: (i) whether the decison in HORNBY (1946), 32 Cr. App. R. 1, invalidates a charge of gross indecency under section 11 of the Criminal Law Amendment Act, 1885, against one only of the two alleged participants when the other gives evidence for the Crown that he did not consent to the act: (ii) whether the words " with another male person " in section 11 aforesaid mean exclusively " with the consent of " the other person involved, or whether the decision of the Court for Consideration of Crown Cases Reserved in JONES, [1896] 1 Q. B. 4, supports a charge in such a case as aforesaid under section 11 of the Act of 1885.

*E. L. Bradley*, for the appellant:

The conviction was wrong, because an act of gross indecency can be only a joint and concerted act between two persons, and it is necessary, if one is to be convicted, that the other also should be charged and convicted. [He referred to HORNBY (*supra*).]

*Henry Elam*, for the Crown.

HUMPHREYS, J.: This is an appeal as the result of a certificate granted by the learned Recorder at the Central Criminal Court in these circumstances: the appellant was convicted of the offence of attempting to commit an act of gross indecency with another person, one Flynn. The jury were properly directed in the matter and the sole ground upon which the certificate was granted was put in this way: " The point of law is whether the decision in HORNBY (1946), 32 Cr. App. R. 1, invalidates a charge of gross indecency under section 11 of the Criminal Law Amendment Act, 1885, against one only of the alleged participants when the other gives evidence for the prosecution that he did not consent to the act ". That is the first point. The second point is: " Whether the words ' with another male person ' in section 11 aforesaid mean exclusively ' with the consent of ' the other person involved, or whether the decision of the Court for the Consideration of

1951.
*Jan.* 31.

JOHN PEARCE.

Goddard, L.C.J., Humphreys, J., Devlin, J.

Crown Cases Reserved, in the case of JONES, [1896] 1 Q. B. 4, supports a charge in such a case as aforesaid under section 11 of the Act of 1885 ".

In the view of this Court the fact that the conviction here was for an attempt only differentiates this case entirely from the case of HORNBY (*supra*) and, indeed, makes this matter unarguable, because the question whether the jury could properly have convicted one of two persons and not the other if they had been indicted together is immaterial. What the jury found in this case was that the appellant tried to commit an act of gross indecency with Flynn, that he failed, and was thereby guilty of attempting to commit that offence. Why that should not be an indictable offence we cannot appreciate.

It is necessary, however, to look at the case of HORNBY (*supra*) to see what really was decided in that case, which was something very different. In that case two persons were charged with an act of gross indecency, and they were also charged with attempted buggery. They were both acquitted on that second charge and they were both convicted of committing an act of gross indecency with each other. The point that really was raised on the appeal from that conviction was whether physical contact is necessary to constitute the offence of gross indecency. That point does not arise in the present case. Having dealt with that point, Lynskey, J., said this (32 Cr. App. R. at p. 3): " In this case, the difficulty which we feel in supporting the convictions is that the Chairman nowhere directed the jury that they had to find that the two men were acting in concert—that they were each committing an act, or being a party to an act, of gross indecency the one with the other ". Then he criticised the actual direction of the Judge who tried that case.

With that this Court entirely concurs. Obviously it is an offence which, if two persons are to be convicted of it, must be proved to have been committed with the consent of both of them, acting in concert together, otherwise those two persons cannot be convicted. There is nothing to support the proposition that where two persons are jointly indicted

1951. *Jan.* 31.

JOHN PEARCE.

Goddard, L.C.J., Humphreys, J., Devlin, J.

for such an offence, one cannot be convicted and the other acquitted. On the contrary, JONES (*supra*) is a direct authority to the contrary. HORNBY'S CASE (*supra*) decides no more than this, that if both are to be convicted then there must be a proper direction telling the jury that in the case of each person he must be proved to have committed that offence with the other person.

In this case only one was actually charged and the argument was that he could not be convicted, apparently because the other one was not charged and convicted. In our opinion there is no ground upon which that argument can be supported. The learned Recorder was right in telling the jury that he could be convicted, and he was. Therefore the appeal is dismissed.

*Appeal dismissed.*

---

*Solicitor:* The Solicitor, Metropolitan Police, for the Crown.

---

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE DEVLIN AND MR. JUSTICE BARRY.

---

1951. *Feb.* 5.

JOHN JAMES BARKER.

*Quarter Sessions — Committal for Sentence — Identification of Prisoner—Criminal Justice Act*, 1948 (11 & 12 *Geo.* 6, *c.* 58), *s.* 29.

Where a prisoner, after conviction by magistrates, is committed to quarter sessions for sentence under section 29 (1) of the Criminal Justice Act, 1948, he should be asked at quarter sessions whether he admits that he is the person mentioned in the conviction, and, if he does not admit it, he should be identified by a police officer as such person.

1951.
*Feb.* 5.

JOHN JAMES BARKER.

Goddard, L.C.J., Devlin, J., Barry, J.

Appeal against sentence.

The appellant pleaded Guilty at Newport Magistrates' Court to obtaining money by false pretences, and asked that thirteen other similar offences be taken into consideration. He was committed to Monmouthshire Quarter Sessions for sentence under section 29 (1) of the Criminal Justice Act, 1948, and on November 24, 1950, the Appeal Committee passed a sentence of five years' imprisonment.

*Lucy J. Griffiths*, for the appellant.

No counsel appeared for the Crown.

THE LORD CHIEF JUSTICE [after stating that, in the opinion of the Court, there was no ground for interfering with the sentence:] Miss Griffiths has called our attention to one matter. It is desirable that the practice should be uniform in these cases. When a prisoner is committed in custody to quarter sessions for sentence under the new procedure it is desirable, as is done in most places, that there should be a formal identification of him by a police officer as the man who is mentioned in the conviction; or the prisoner can be asked if he admits that he is the man who is mentioned in the conviction and has been committed for sentence. In this case there is no question that he was the person committed for sentence and it is quite obvious from the proceedings at quarter sessions that he knew perfectly well that he had been committed for sentence. No notice need be taken of the matter in this case, but it is desirable that there should be a uniform practice. The practice should be that the prisoner should be asked whether he admits he is the person mentioned in the conviction; if he does not admit it, he should be identified by a police officer as the person mentioned in the conviction.

*Appeal dismissed.*

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE DEVLIN AND MR. JUSTICE BARRY.

1951.
*Feb. 5.*

## ALEXANDER McCLELLAND.

*Order of Conditional Discharge—Not to be Accompanied by Fine—Criminal Justice Act*, 1948 (11 & 12 *Geo.* 6, *c.* 58), *ss.* 7 (1), 13.

An order of conditional discharge, which can be made only where the Court does not think fit to impose punishment, cannot be accompanied by the imposition of a fine, which is a punishment.

Appeal against sentence.

The appellant was convicted at Andover Quarter Sessions on November 14, 1950, of housebreaking, and three outstanding charges were taken into consideration. The Recorder made an order of conditional discharge for twelve months, imposed a fine of £10, and ordered the appellant to pay £10 towards the cost of the prosecution.

*Ian S. Hill*, for the appellant:

Just as a probation order cannot be accompanied by the imposition of a fine (PARRY AND OTHERS (1950), 34 Cr. App. R. 224), so too an order of conditional discharge, where the Court refrains from imposing punishment, cannot be accompanied by a fine, which in itself is a punishment.

No counsel appeared for the Crown.

THE LORD CHIEF JUSTICE: This appellant was convicted at the Andover Quarter Sessions of housebreaking in the Aldershot district. He is a soldier in the Army Catering Corps and the Recorder, in addition to making an order of conditional

1951.
*Feb.* 5.

ALEXANDER McCLELLAND.

Goddard, L.C.J., Devlin, J., Barry, J.

discharge, fined him £10 and ordered him to pay £10 costs, imposing a penalty of six months' imprisonment in default of the payment of the fine. Apparently the learned Recorder's order of instalments of £1 a week was to apply to the costs as well as to the fine. Three outstanding charges were taken into consideration.

The Court agrees with the point submitted by counsel on the appellant's behalf, that if a fine is imposed there is no power to make an order of conditional discharge. If an order of conditional discharge is made you cannot fine, because a fine is a punishment and conditional discharge can only be granted where a Court does not think fit to impose a punishment. But we think, considering that there was a previous conviction in this case and that the appellant asked for three outstanding cases to be taken into consideration, that it was quite right to impose such punishment; therefore what the Court proposes to do is to set aside the judgment as passed and to substitute for it a fine of £10, payable by weekly instalments of £1 starting from today, but credit to be given for anything paid since November 30, 1950, and in default of payment of any instalment, six months' imprisonment. That is not as hard as it sounds, because if the appellant goes to prison in default of payment of an instalment, on payment of the next instalment he will get out of it. That is all provided for in the Act.

There will also be an order for the payment of £10 costs, but the Court does not say anything about how that is to be paid, because it appears to the Court that it has no power to do so. If the appellant does not pay, section 6 (5) of the Costs in Criminal Cases Act, 1908, provides that costs are to be recovered as a civil debt as on a judgment or order of a Court of summary jurisdiction, and whoever is responsible for collecting costs will no doubt know, or can find out, what steps can be taken to recover the costs if they are not paid, because we see that the appellant comes out of the Army in April.

Notice of this order and a transcript should be sent to the Clerk of the Peace with a request that it shall be sent on to

1951.
*Feb. 5.*

ALEXANDER McCLELLAND.

Goddard, L.C.J., Devlin, J., Barry, J.

the officer commanding the appellant's regiment. With regard to the costs, the Army authorities, if he is still in the Army when the fine has been paid, have power under the Army Act to make a deduction towards costs which he is ordered to pay, but that appears to be entirely a matter for the Army authorities and not for this Court.

*Sentence varied.*

---

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HILBERY AND MR. JUSTICE DEVLIN.

---

1951.
*Feb. 19.*

## FRED BALL.

*False Pretences—Indictment—Obtaining from Agent of Owner—Authority of Agent to Pass Property Co-Equal with that of Owner—Allegation that Property was Obtained from Agent—Larceny Act*, 1916 (*6 & 7 Geo. 5, c. 50*), *s.* 32 (1).

A person is guilty of obtaining goods by false pretences, if he obtains them by false pretences, with intent to defraud, from an agent of the owner who has an authority to pass the property in the goods co-equal with that of the owner, and in such a case he may be indicted for having obtained the goods from the agent.

PRINCE (1868), L. R. 1 C. C. R. 150, approved and followed.

Appeal against conviction and sentence (on certificate).

The appellant was convicted at Wiltshire Quarter Sessions on January 4, 1951, of obtaining a cheque for £10 by false pretences and was sentenced by the Deputy-Chairman to nine months' imprisonment.

The Particulars of Offence alleged that the appellant "on October 5, 1950, in the County of Wilts, with intent to defraud, obtained from Mary Gwyn Galsworthy a certain valuable security, namely, a cheque for £10, drawn by William Donald

1951.
*Feb.* 19.

FRED BALL.

Goddard, L.C.J., Hilbery, J., Devlin, J.

Galsworthy on the Midland Bank, Ltd., Bradford-on-Avon, by falsely pretending that he had delivered to the said William Donald Galsworthy peat blocks to the value of £10 calculated at the rate of £3 per 1,000 blocks". The appellant appeared at the Vicarage at Bradford-on-Avon with a load of peat and represented to the vicar, the Rev. Wm. Donald Galsworthy, that he could sell him the peat at a cheap rate of £3 per 1,000 blocks. The vicar gave a cheque drawn by him to his wife and authorised her to pass it to the appellant if he delivered the property. Later the appellant came to Mrs. Galsworthy and told her that he had delivered about 3,000 blocks and that the price would be £10. Mrs. Galsworthy then handed over her husband's cheque for £10 to the appellant. In fact, the appellant had delivered only 980 blocks.

*J. T. Molony*, for the appellant:

Obtaining a chattel or money or a valuable security by false pretences means obtaining ownership in the article alleged to have been obtained from the person who was previously the owner. It is clear that the cheque in this case did not belong to Mrs. Galsworthy, from whom it was alleged in the indictment to have been obtained, but to her husband. The prosecution, no doubt, felt a difficulty in alleging the cheque to have been obtained from the owner of it, Mr. Galsworthy, because no false pretence was made to him, but they could have preferred a different charge under the same section, namely, that of causing the cheque to be delivered to himself. In those circumstances Mrs. Galsworthy's name could have been put in the indictment, as she was the person who was induced to deliver and the question of ownership would not have arisen. Where, however, the prosecution elect to lay the indictment under the earlier part of the section, it is essential that the right person should be named as owner. There was, accordingly, no evidence to support the indictment as laid. [He referred to PRINCE (1868) L. R. 1 C. C. R. 150.]

*H. S. Russell*, for the Crown, was not called on to argue.

1951.
*Feb.* 19.

FRED BALL.

Goddard, L.C.J., Hilbery, J., Devlin, J.

THE LORD CHIEF JUSTICE: In this case the appellant, who appeals on a certificate granted by the Deputy Chairman of Wiltshire Quarter Sessions out of deference to an argument addressed to the Court by Mr. Molony, was charged for that he "on the 5th October, 1950, with intent to defraud, obtained from Mary Gwyn Galsworthy a certain valuable security, namely, a cheque for £10, drawn by William Donald Galsworthy on the Midland Bank, Ltd., Bradford-on-Avon, by falsely pretending that he had delivered to the said William Donald Galsworthy peat blocks to the value of £10 calculated at the rate of £3 per 1,000 blocks".

The appellant appeared at the Vicarage at Bradford-on-Avon with a load of peat and represented to the vicar that he could sell him the peat at a cheap rate of £3 per 1,000 blocks. The vicar was willing to buy that class of fuel and, being told that there was about £10 worth, left a cheque with his wife. He gave his cheque to his wife to pass to the appellant if he delivered this property to her. Later the appellant came to Mrs. Galsworthy, and told her he had delivered the peat, about 3,000 blocks, and that the price would be £10. Thereupon she, having authority from her husband so to do, handed over the cheque. When the vicar came back he saw at once that there were not 3,000 blocks, or anything like it, and on counting them found that there were only 980. It was a clear case of obtaining money by false pretences.

The objection taken was that the indictment alleged that the appellant obtained the cheque from Mrs. Galsworthy when it should have been alleged that he obtained the cheque from Mr. Galsworthy, because the cheque was Mr. Galsworthy's, Mrs. Galsworthy being his agent. Section 32 of the Larceny Act, 1916, provides: "Every person who by any false pretence —(1) with intent to defraud, obtains from any other person any chattel, money, or valuable security, or causes or procures any money to be paid, or any chattel or valuable security to be delivered to himself or to any other person for the use or benefit or on account of himself or any other person" shall

1951.
*Feb.* 19.

FRED BALL.

Goddard, L.C.J., Hilbery, J., Devlin, J.

be guilty of a misdemeanour. The section does not say "obtains from the owner"; but "obtains from any other person". There is no doubt that "obtains" means obtaining the property and not merely possession, and the obtaining must not be in such circumstances as amount to larceny for this purpose. There must be an intent to obtain a valuable security from some other person. The appellant obtained the cheque from the person named in the indictment, that is, Mrs. Galsworthy; she was the vicar's agent and had authority from the vicar to pass the property in the cheque, and she did pass the property in it. Therefore the appellant obtained the cheque and obtained the property in it from the person to whom he made a false representation, and he did it with intent to defraud. All the necessary elements, therefore, of obtaining by false pretences appeared to be present.

Mr. Molony's argument was that the appellant obtained the cheque from the vicar. It may be that the indictment would have been equally good if it had alleged that he had obtained it from the vicar. The statute does not make it necessary to allege that the prisoner obtained the property from the owner; the words are "obtains from any other person", and that would include a person who had authority to pass the property.

The case is really, in my opinion, concluded by the observations of Blackburn, J., in PRINCE (1868), L. R. 1 C. C. R. 150, to which Mr. Molony called our attention. Blackburn, J., said (at p. 155): "However, as the law now stands, if the owner intended the property to pass, though he would not so have intended had he known the real facts, that is sufficient to prevent the offence of obtaining another's property from amounting to larceny; and where the servant has an authority co-equal with his master's, and parts with his master's property, such property cannot be said to be stolen, inasmuch as the servant intends to part with the property in it". That is exactly what happened here. The servant intended to part with the property in it and the servant had authority co-equal

1951.
*Feb.* 19.

FRED BALL.

Goddard, L.C.J., Hilbery, J., Devlin, J.

with the authority of the owner to pass the property. Chief Justice Bovill, who gave judgment before Blackburn, J., said (at p. 154): "Here, however, it seems to me that the bank clerk had a general authority to part with both the property in and possession of his master's money on receiving what he believed to be a genuine order, and that as he did so part with both the property in and possession of the note in question the offence committed by Mrs. Allen falls within the cases which make it a false pretence".

Here it seems to us that Mrs. Galsworthy had authority to part with the property in the cheque, and she did part with the property in it to the appellant in circumstances which made him the owner of the cheque. He got the property in it and he got it by false pretences. Accordingly, in our opinion, no objection can be taken to the indictment and this point fails.

With regard to the sentence, a sentence of nine months for a bare-faced, impudent fraud of this description by a man who had three or four convictions, though it is true he had not had one since 1943, cannot possibly be said to err in principle and we cannot interfere with it.

The appeal is dismissed.

*Appeal dismissed.*

*Solicitors*: Pennington & Son, agents for Lemon, Humphreys & Parker, Swindon, for the appellant; Wansbroughs & Co., Devizes, for the Crown.

## NOTE ON PROCEDURE

### *Committal for Trial of Company*

In Rex *v.* Deputy-Recorder of Wolverhampton, *ex p.* Director of Public Prosecutions, a company had been committed for trial to Wolverhampton Borough Quarter Sessions, but the Deputy-Recorder declined to proceed with the hearing of the case on the ground that there had been no valid committal for trial which would satisfy section 33 (1) of the Criminal Justice Act, 1925, as amended by the Administration of Justice (Miscellaneous Provisions) Act, 1933, s. 1, because the order of the committing magistrate was not under seal. The Director of Public Prosecutions obtained leave to apply for an order of *mandamus* directing the Deputy-Recorder to proceed with the hearing of the case. On February 23, 1951, the Divisional Court (the Lord Chief Justice and Mr. Justice Barry) ordered that *mandamus* should issue, and in giving judgment, the Lord Chief Justice referred to H. Sherman, Ltd. (33 Cr. App. R. 151; [1949] 2 K. B. 674) and said: "It was, perhaps, a slip on my part when I said (at pp. 156 and 681 of the respective reports) '[an order in writing] bearing the seal of the Court', because it is well known that no court of summary jurisdiction has a seal. Most of them have a rubber stamp which the clerk of the court uses, because that does show that the document is authenticated. It would have been, I think, more accurate if I had said 'under the hand of the presiding magistrate and bearing the stamp of the Court, if there is one'".

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE CASSELS AND MR. JUSTICE LYNSKEY.

1951.
*Mar. 20.*

## DANIEL LOVEGROVE.

*Practice—Trial Judge Member of Court of Criminal Appeal—Ground of Appeal that Verdict was Wrong.*

Although there are cases in which it is undesirable that the trial Judge should sit as a member of the Court of Criminal Appeal, there is no objection to the practice where the only ground of appeal is that the verdict was wrong.

SHARMAN (1913), 9 Cr. App. R. 130 and BENNETT AND NEWTON, 9 Cr. App. R. 146, considered.

Application for leave to appeal against conviction.

The applicant was convicted at Bedfordshire Assizes on January 18, 1951, of receiving stolen property and was sentenced by Lynskey, J., to five years' imprisonment.

No counsel appeared.

THE LORD CHIEF JUSTICE: The only matter of real interest in this case is a practice point.

The applicant was convicted before Lynskey, J., at Bedfordshire Assizes and his application for leave to appeal, which has already been refused by the single Judge, now comes before this Court, of which Lynskey, J., is sitting as a member. Undoubtedly it has been the practice recently, if the trial Judge happens to be sitting in the Court of Criminal Appeal, to adjourn the case, but the question is whether that is a practice which need be followed in all cases in future.

Occasionally it may well be that it would be undesirable for the trial Judge to sit when the application or appeal comes before the Court. It all depends; in a great number of cases the appeal is simply an argument that the verdict was wrong.

1951.
*Mar.* 20.

DANIEL LOVEGROVE.

Goddard, L.C.J., Cassels, J., Lynskey, J.

That has nothing to do with the Judge and it is quite immaterial whether the Judge who tried the case happens to be a member of this Court or not, because the Court, of course, does not interfere with verdicts of juries, provided there is evidence to support them and no misdirection is alleged.

There may be occasions, sometimes, in final appeals on which it would be undesirable, and might even be embarrassing, if the trial Judge sat. A good many years ago this matter was considered and it was pointed out that in former days, before the Judicature Act, when there was no Court of Appeal but appeals were taken before the three common law Courts *in banc*, it was quite a common and everyday practice for the Judge before whom the trial had taken place and whose ruling, indeed, might be impugned, to sit as a member of the Court, even in some cases where he had sealed the bill of exceptions. This matter was considered further in SHARMAN (1913), 9 Cr. App. R. 130, where an application was made by counsel on behalf of the appellant on the ground that the Judge who tried the case, Ridley, J., was a member of the Court of Criminal Appeal, and was in fact presiding. Darling, J., giving the judgment of the Court, said (at p. 131): "I think this application ought not to be granted. After the assizes, appeals come from all parts of the country; and if appellants are to be allowed to select the Judges who shall hear their appeals, the business of the Court could not be carried on. Before the days of the Judicature Act, when the Courts of Queen's Bench, Common Pleas and Exchequer sat in banc to hear appeals (of course, not criminal appeals), it was the usual practice for the Judge who tried the case to be present".

The matter was considered again the same year in BENNETT AND NEWTON, reported in the same volume at p. 146. The report states that, on an application that the sentence might run from the date of conviction, Darling, J., said (at p. 157): "The case was in the list, but defendants wished it to be postponed because the trial Judge was then a member of the Court. There was, of course, no statutory objection to the Judge sitting, and it would almost be impracticable to prohibit this unless there

1951.
*Mar.* 20.

DANIEL LOVEGROVE.

Goddard, L.C.J., Cassels, J., Lynskey, J.

were more Judges in that division. There was always an investigation by a single Judge before a case came into that Court, and there must be at least two other Judges with the trial Judge. It was a great mistake to suppose that the trial Judge would be inclined to set up his view against the opinions of his brethren or ' to fight for his own hand '. The trial Judge in this case at once assented to the adjournment. Lord Alverstone had always strongly objected to such applications being granted as matters of course ".

As I say, there are cases in which no doubt it would be desirable that the trial Judge should not sit, but in a case where the ground of appeal is nothing but an argument by the appellant that the verdict was wrong there is no ground whatever for the trial Judge not sitting; in fact, it might be very useful sometimes that he should.

In this particular case the applicant was convicted on two charges of receiving stolen property and was sentenced to five years' imprisonment. The case against him was perfectly simple. He was charged with receiving an electric torch, three keys and one key-ring, and also with receiving a raincoat knowing them to have been stolen. The keys were proved to have been stolen, and with regard to the raincoat, it was proved that the applicant took it to cleaners six days after it was stolen, and therefore, of course, he was in possession of property recently stolen. His explanation to the police at first was: " That is not my coat; I have never seen it before ". When he came to trial, he said: " It is my raincoat; it was given to me by some officers in 1946 ". In view of those two different statements it is not surprising that the jury convicted him.

I need not go through the facts relating to the next case. He was found in possession of stolen property. He gave no explanation which could be accepted by the jury and he was convicted. It was purely a matter for the jury and he only argues in his notice of appeal that the jury ought not to have convicted him. That is not a ground which this Court ever entertains when the question is simply one of fact.

1951.
*Mar.* 20.

DANIEL LOVEGROVE.

Goddard, L.C.J., Cassels, J., Lynskey, J.

The applicant does not appeal against sentence. There is no ground whatever for interfering with the conviction and the application is refused.

*Application refused.*

---

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HILBERY AND MR. JUSTICE HALLETT.

---

1951.
*Mar.* 5.

## WILLIAM JOHN LINSEY MARQUIS

*Outstanding Charges—Procedure—Evidence of Character after Conviction.*

The proper practice with regard to outstanding charges is that the prisoner (and not his counsel) should be told what the offences are and asked whether he admits them and desires that they should be taken into consideration. The details of each offence need not in every case be put to him, but he should be asked whether he has received the list of offences and signed it, so that, if need be, he may have the opportunity of correcting himself by saying that he does not admit the offences or that he admits some of them only.

Observations on evidence of antecedents after conviction.

Appeal against sentence.

The appellant pleaded Guilty at Barnstaple Magistrates' Court on December 27, 1950, to two charges of obtaining money by false pretences and he informed the magistrates that he desired nineteen other similar charges to be taken into consideration. The magistrates committed him, under section 29 (1) of the Criminal Justice Act, 1948, for sentence to

1951.
*Mar. 5.*

WILLIAM JOHN LINSEY MARQUIS.

Goddard, L.C.J., Hilbery, J., Hallett, J.

Barnstaple Quarter Sessions, and he was there sentenced by the Recorder on January 11, 1951, to eighteen months' imprisonment.

*John Ward,* for the appellant.

No counsel appeared for the Crown.

THE LORD CHIEF JUSTICE: This appellant was brought before a Court of Summary Jurisdiction at Barnstaple on two charges of obtaining money by false pretences, namely, by worthless cheques, and he told the magistrates that he desired nineteen other similar charges to be taken into consideration. Thereupon the magistrates committed him to quarter sessions for sentence, because they thought that, having regard to his character and antecedents, the sentence which they could pass upon him was not adequate. The learned Recorder seems to have been disposed to disagree with a ruling of this Court [in VALLETT (1950) 34 Cr. App. R. 251] on the meaning of "character and antecedents" for the purpose of section 29 of the Criminal Justice Act, 1948. However, he said he was bound to follow the decision of this Court, as indeed he was, and he passed a sentence of eighteen months' imprisonment. It was shown that the appellant, over a period of two months, was giving worthless cheques on a very large scale all over North Devon. That is a very insidious form of fraud, and it is always treated as a serious offence. We cannot possibly say that a sentence of eighteen months erred in principle; in fact, it was a light sentence and might have been considerably more severe, but as the appellant has had no previous conviction, this Court will not increase the sentence.

I should like, for the guidance of quarter sessions, to repeat that where a prisoner asks for other offences to be taken into account, it is not enough for the Court to be told that the prisoner has signed a form on which the other offences are mentioned. The prisoner should be told what those other offences are, and himself asked whether he admits them and

1951.
*Mar.* 5.

WILLIAM JOHN LINSEY MARQUIS.

Goddard, L.C.J., Hilbery, J., Hallett, J.

desires them to be taken into consideration. It is not necessary in every case to put the details of each offence, but he may be asked: "Have you received and signed this list of cases showing the other offences which are outstanding against you?" If he says "yes", he should then be asked: "Do you admit those offences and wish them to be taken into consideration?" Then he can say "yes" or "no" as the case may be, or he can say: "yes, I admit some, and I do not admit others". That was not done in this case, and it ought to have been done, but it is not a rule of law that that must be done, for taking of cases into consideration is only what I may call a convention. It has been a device that has been put into force by the Judges now for a great many years with a view to preventing a prisoner who has served his sentence from being arrested on the other charges immediately he comes out of prison. Therefore, if there are charges outstanding against him which are not before the Court when he is on indictment, he can ask the Court to take them into consideration, and so get a clean sheet when he comes out.

The other thing to which I desire to call attention is that the learned Recorder seems to have had some doubt whether he could accept what he called "hearsay evidence" of character after conviction. Of course he could, because after conviction the Court is always informed of the character which the prisoner bears, and that character is very often proved by a police officer perhaps in Devon referring to convictions which have taken place in Northumberland, or Yorkshire, or anywhere else. He cannot speak of his own knowledge about them, but he can produce the prisoner's record, and it is always perfectly proper to take into account any information which can be given, either for or against the prisoner, although the matter is not proved with the strictness which would be necessary to prove an issue during the trial. It would be a very unfortunate thing if evidence of that kind could not be given, because it would prevent evidence from being given in favour of the prisoner, and would prevent a police officer

1951.
*Mar.* 5.

WILLIAM JOHN LINSEY MARQUIS.

Goddard, L.C.J., Hilbery, J., Hallett, J.

from saying: "I have made inquiries of the prisoner's employer, he works well and his character is good". After conviction, any information which can be put before the Court can be put before it in any manner which the Court will accept.

There is nothing in this appeal, and it is dismissed.

*Appeal dismissed.*

BEFORE

MR. JUSTICE OLIVER, MR. JUSTICE CASSELS AND MR. JUSTICE SELLERS.

---

SIDNEY JOSEPH BARNETT.
JOHN LIPTON.
GEORGE BIRD GARNHAM.
FRANK WALTER TILLY.
SYDNEY WILLIAM PLATT.
REGINALD JAMES LOW.
FRANK MENO SECKEL.
JOEL CARMELL.

1951.
*Apr.* 9, 10.

*Conspiracy — Alleged Agreement by Dealers to Form Ring — Knock-out Auction — New Offence Created by Statute — Summary Trial Prescribed — Offence not Triable on Indictment — Auction (Bidding Agreements) Act*, 1927 (17 & 18 *Geo.* 5, *c.* 12), *s.* 1.

The appellants were convicted of conspiring together and with other persons unknown to contravene the provisions of section 1 of the Auction (Bidding Agreements) Act, 1927, by, being dealers, agreeing to offer and accept consideration as an inducement or reward for abstaining from bidding at sales by auction.

*Held*, that as the offence under section 1 of the Act of 1927 was created for the first time by that section, and a definite procedure for its trial, namely summary trial only, with the consent of one of the Law Officers, was prescribed by the Act, and as the particulars of the conspiracy alleged were in terms or in substance the offence prescribed by the Act, the offence was not triable on indictment and the indictment should have been quashed at the outset. The convictions, therefore, must be quashed.

EASTERN ARCHIPELAGO CO. *v.* REG. (1853), 2 E. & B. 856; HALL, [1891] 1 Q. B. 747; and KAKELO, 17 Cr. App. R. 149; [1923] 2 K. B. 793, followed.

Appeals against conviction.

The appellants were convicted at the Central Criminal Court

1951.
*Apr.* 9, 10.

SIDNEY JOSEPH BARNETT.
JOHN LIPTON.
GEORGE BIRD GARNHAM.
FRANK WALTER TILLY.
SYDNEY WILLIAM PLATT.
REGINALD JAMES LOW.
FRANK MENO SECKEL.
JOEL CARMELL.

Oliver, J., Cassels, J., Sellers, J.

on February 27, 1951, of conspiracy to contravene section 1 of the Auction (Bidding Agreements) Act, 1927, and were sentenced by the Recorder of London as follows: the first seven appellants were each fined £100 and ordered to pay £50 towards the costs of the prosecution; the eighth appellant was fined £50.

All the appellants were interested and held offices in companies or businesses dealing in scrap metal. The case for the prosecution was that they agreed to form a ring and attend sales where cable and other similar commodities were sold, where one representative of the ring would bid on behalf of all, and that after the goods had been acquired, the appellants held a knock-out auction among themselves, until they finally reached the top knock-out price, the difference between that and the actual price being split up by agreement, so that each would get a proportion of the profit in relation to their bids. A submission was made to the Recorder on behalf of all the then defendants that the count ought to be quashed, as the offence charged was one in respect of which an indictment would not lie, but the submission was overruled.

*G. D. Roberts*, K.C., and *S. A. Morton*, for the first appellant:

The offence of which the appellants were convicted was not an indictable offence. In substance or in terms it was no more than the offence created for the first time by section 1 of the Act of 1927. It was, therefore, triable only in the manner provided by that section, namely, summarily with the consent of one of the Law Officers, and therefore, within six months of the date of the alleged commission. [He referred to EASTERN ARCHIPELAGO CO. *v.* REG. (1853), 2 E. & B. 856; HALL [1891] 1 Q. B. 747; and KAKELO, 17 Cr. App. R. 149; [1923] 2 K. B. 793.] Prior to the Act of 1927 an agreement of the kind under consideration was not an offence: RAWLINGS *v.* GENERAL TRADING CO., [1921] 1 K. B. 635. The Recorder should, therefore, have acceded to the submission made at the outset

1951.
*Apr.* 9, 10.

SIDNEY JOSEPH BARNETT.
JOHN LIPTON.
GEORGE BIRD GARNHAM
FRANK WALTER TILLY.
SYDNEY WILLIAM PLATT.
REGINALD JAMES LOW.
FRANK MENO SECKEL.
JOEL CARMELL.

OLIVER, J.,
CASSELS, J.,
SELLERS, J.

and quashed the count. Even assuming the count to have been good, the offence charged was not supported by the evidence.

*W. J. K. Diplock*, K.C., and *James Burge*, for the appellant Lipton; *R. F. Levy*, K.C., and *J. L. Elson Rees*, for the appellants Garnham and Tilly; *A. P. Marshall*, K.C., and *George Pollock*, K.C., for the appellant Platt; *Gerald Howard*, K.C., and *C. L. Hawser*, for the appellant Low; *Geoffrey Lawrence*, K.C., and *J. S. Streeter*, for the appellant Seckel; *Bernard Finlay*, for the appellant Carmell, were not called on to argue.

*R. E. Seaton* and *J. Maxwell Turner*, for the Crown:

The offence charged here was a conspiracy, a different offence from the offence prescribed by the Act of 1927, and as such triable on indictment.

SELLERS, J.: These eight appellants were convicted at the Central Criminal Court before the learned Recorder on the second of two counts of an indictment. The second count alleged a conspiracy to contravene the provisions of the Auctions (Bidding Agreements) Act, 1927. Seven of them were each fined £100 and ordered to make a contribution towards the costs of the prosecution, and the eighth was fined £50. From those convictions each of the appellants now appeals, alleging, as was alleged at the outset of the trial before the learned Recorder, that the count on which they were convicted was bad in law. That submission was treated at the trial as a submission on behalf of all the defendants, supported by advocacy on behalf of several of them, and has been made before us by counsel on behalf of the appellant Sidney Joseph Barnett. The submission is common to all the appellants and, if it is good, requires this Court to allow the appeal on the ground that that count in the indictment ought to have been quashed at the outset.

The proceedings commenced with an indictment containing two counts. The first was a conspiracy to defraud

1951.
*Apr.* 9, 10.

SIDNEY JOSEPH BARNETT.
JOHN LIPTON.
GEORGE BIRD GARNHAM.
FRANK WALTER TILLY.
SYDNEY WILLIAM PLATT.
REGINALD JAMES LOW.
FRANK MENO SECKEL.
JOEL CARMELL.

Oliver, J.,
Cassels, J.,
Sellers, J.

the Treasury, and the second was this count which now falls for consideration. On the first count, towards the end of the hearing the learned Recorder intervened and, as a consequence, it was withdrawn, and ultimately the jury, on the direction of the learned Recorder, returned verdicts of Not Guilty in the case of each appellant. The matter then was left for final consideration of the jury on the second count only. That count alleged that the respective defendants "between the 26th day of September, 1949, and the 5th day of January, 1950, in the County of London, conspired together and with other persons unknown to contravene the provisions of section 1 of the Auction (Bidding Agreements) Act, 1927, by, being dealers, agreeing to offer and accept consideration as an inducement or reward for abstaining from bidding at sales by auction".

Section 1 (1) of the Act of 1927 provides: "If any dealer agrees to give, or gives, or offers any gift or consideration to any other person as an inducement or reward for abstaining, or for having abstained, from bidding at a sale by auction either generally or for any particular lot, or if any person agrees to accept, or accepts, or attempts to obtain from any dealer any such gift or consideration as aforesaid, he shall be guilty of an offence under this Act, and shall be liable on summary conviction to a fine not exceeding £100, or to a term of imprisonment for any period not exceeding six months, or to both such fine and such imprisonment. Provided that, where it is proved that a dealer has previously to an auction entered into an agreement in writing with one or more persons to purchase goods at the auction bona fide on a joint account, and has before the goods were purchased at the auction deposited a copy of the agreement with the auctioneer, such an agreement shall not be treated as an agreement made in contravention of this section". In sub-section (2) there is a definition of "dealer", with which the Court is not at the moment concerned. In sub-section (3) there is a provision: "In England and Wales a prosecution for an offence under this section shall not be

1951.
*Apr.* 9, 10.

SIDNEY JOSEPH BARNETT.
JOHN LIPTON.
GEORGE BIRD GARNHAM.
FRANK WALTER TILLY.
SYDNEY WILLIAM PLATT.
REGINALD JAMES LOW.
FRANK MENO SECKEL.
JOEL CARMELL.

Oliver, J.,
Cassels, J.,
Sellers, J.

'instituted without the consent of the Attorney-General or the Solicitor-General".

It has been submitted that the offence with which the appellants were charged and of which they have been convicted was not an indictable offence, but was in substance or in terms no more than an offence framed for the first time under this Act of 1927, and only triable summarily with the consent of one or other of the Law Officers, and that, being an offence which was triable summarily, it was only triable in any event within six months of the date of its alleged commission.

The short facts with which it is necessary to deal under the present submission are these: the eight appellants are all interested, in one capacity or another, in businesses—seven limited companies and one firm—which deal in scrap metal. Some, perhaps the majority, of the appellants' companies or businesses are in a big way of trade and the appellants themselves hold high offices in those companies or businesses. The offence charged alleges, and the evidence was directed to establish, that the appellants met together and agreed to form a ring and attended at sales where Ministry of Supply commodities, mainly cable and other similar commodities, were being sold, and that some representative on behalf of this ring bid there on behalf of all; that goods were acquired and subsequently there was what has been described as a "knock-out", whereby the purchased goods were put up for auction and then, on a system of bidding whereby the various parties bid up to a sum which they thought was safe and was within their power, finally reached the top knock-out price; then the difference between the two prices, as I understand it, was split up by some agreement between the parties, so that each got a proportion of that profit in relation to the extent of their bids. It is that alleged sort of agreement, operating, as it is said, on two occasions when sales took place, one at Weston-super-Mare and one at Todmorden, which gave rise to this charge. I need not go into the evidence more fully because, in the

1951.
*Apr.* 9, 10.

SIDNEY JOSEPH BARNETT.
JOHN LIPTON.
GEORGE BIRD GARNHAM.
FRANK WALTER TILLY.
SYDNEY WILLIAM PLATT.
REGINALD JAMES LOW.
FRANK MENO SECKEL.
JOEL CARMELL.

Oliver, J.,
Cassels, J.,
Sellers, J.

conclusion to which this Court has come, this offence could not be tried on indictment, and the submissions made on behalf of the eight appellants in our opinion were good and the count should have been quashed at the outset.

The basis on which the submission was made to the learned Recorder and before us in this Court is this: it is said, and said rightly, that prior to the Act of 1927 an agreement such as I have very roughly indicated with regard to a ring was not an offence, and was not illegal, and the authority of RAWLINGS *v.* GENERAL TRADING CO., [1921] 1 K. B. 635, was relied on. In the opinion of this Court, it is clear that the forming of a ring in order to bid at an auction in the way indicated was not an offence at law up to the time of the Act of 1927. That being so, it is submitted that there is a well-known principle of law which requires that the procedure laid down by the Act making it an offence should be followed. That principle is to be found very clearly enunciated in the judgment of Williams, J., in EASTERN ARCHIPELAGO CO. *v.* REG. (1853), 2 E. & B. 856. In the course of the judgment he said this (at p. 879): "For example: it is a familiar doctrine that, though, where a statute makes unlawful that which was lawful before and appoints a specific remedy, that remedy must be pursued and no other, yet, where an offence was antecedently punishable by a common law proceeding as by indictment, and a statute prescribes a particular remedy in case of disobedience, that such particular remedy is cumulative, and proceedings may be had either at common law or under the statute".

That principle has been followed and applied in a number of cases, and, as far as we know, has never been dissented from. It has been applied in HALL, [1891] 1 Q. B. 747, at p. 753, in a decision of Charles, J., and more recently in this Court in KAKELO, 17 Cr. App. R. 149; [1923] 2 K.B. 793. That case was concerned with offences under the Aliens Restriction Act, 1914, and the Aliens Restriction (Amendment) Act, 1919, which offences were punishable only in the manner prescribed by the statutes, namely, on summary conviction

1951.
*Apr.* 9, 10.

SIDNEY JOSEPH BARNETT.
JOHN LIPTON.
GEORGE BIRD GARNHAM.
FRANK WALTER TILLY.
SYDNEY WILLIAM PLATT.
REGINALD JAMES LOW.
FRANK MENO SECKEL.
JOEL CARMELL.

Oliver, J.,
Cassels, J.,
Sellers, J.

" unless the person charged with the offence claims the right under section 17 of the Summary Jurisdiction Act, 1879, to be tried with a jury ". In giving the judgment of the Court in that case, Sankey, J., said (at pp. 152 and 795 of the respective reports): " It was contended, thirdly, that the offence under the Aliens Order was punishable by summary conviction, and that sessions had no jurisdiction to entertain the indictment. This depends upon the Aliens Restriction Act, 1914, s. 1 (2), and the Aliens Restriction (Amendment) Act, 1919, s. 13 (4). The law upon the subject is elaborately dealt with in HALL (*supra*), which was a motion to quash an indictment charging one Hall, an overseer of the poor for the parish of St. Mary, Whitechapel, with a misdemeanour. The motion succeeded upon the ground that an offence by an overseer within the meaning of section 51 of the Parliamentary Registration Act, 1843, was not an indictable misdemeanour. Charles, J., went at length through the cases bearing on the matter and referred to the passage in Hawkins' *Pleas of the Crown*, Book 2, ch. 25, s. 4, which is as follows: ' Where a statute makes a new offence which was no way prohibited by the common law, and appoints a particular manner of proceeding against the offender, as by commitment, or action of debt, or information, etc., without mentioning an indictment, it seems to be settled at this day, that it will not maintain an indictment, because the mentioning the other methods of proceeding only, seems impliedly to exclude that of indictment ' ". In the judgment of Charles, J., in HALL (*supra*), reference was made to the judgment of Williams, J., in the EASTERN ARCHIPELAGO CASE (*supra*).

That being, in our opinion, clearly the law applicable to this matter, the question then arises whether this second count of the indictment does allege the very offence which is contained in the Act of 1927, which is triable only according to the terms of the Act as a summary offence. The submission on behalf of the prosecution by Mr. Seaton was that

1951.
*Apr.* 9, 10.

SIDNEY JOSEPH BARNETT.
JOHN LIPTON.
GEORGE BIRD GARNHAM.
FRANK WALTER TILLY.
SYDNEY WILLIAM PLATT.
REGINALD JAMES LOW.
FRANK MENO SECKEL.
JOEL CARMELL.

Oliver, J.,
Cassels, J.,
Sellers, J.

it alleges a conspiracy, which is something different from the offences which the Act prescribes; but whilst it is quite clear that it may be possible to frame a conspiracy to contravene this Act in any given set of circumstances, the Court has to look to see what is in fact alleged. In alleging the conspiracy to contravene the Act particulars are given, and those particulars are, " by, being dealers, agreeing to offer and accept consideration as an inducement or reward for abstaining from bidding at sales by auction ". This Court is of opinion that those particulars of this particular conspiracy which is alleged are in terms the offences which the Act prescribes, or are substantially the same. In those circumstances the well-known principle of law applies and this indictment did not lie; it should have been quashed at the outset of the trial, and on those grounds the Court allows each of these appeals.

It was submitted incidentally by counsel who opened this appeal for the appellant Barnett that the same result should be arrived at in regard to count 1. I have not referred to that because it is not before the Court, and the Court has heard no argument or submissions with regard to it, but it must not be taken that a similar count in appropriate circumstances might not lie, and the decision of the learned Recorder, of course, did not amount to any such finding. Likewise, the Court, having taken this view of the indictment, is not called upon to consider the contention that, assuming that the count was good, the evidence did not in any way support it. The Court has not been called upon to consider whether the appellants were, on the evidence, established to be dealers, which was alleged in the indictment, dealers being the subject of a definition in the Act itself. That matter does not arise. The Court is of the view that count 2 of the indictment, which was alone proceeded with, was bad in law as the appellants have submitted and for those reasons each and all of these appeals is allowed.

*Convictions quashed.*

The Court made an order awarding each of the first seven appellants 100 guineas costs, and eighth appellant 75 guineas costs.

*Solicitors:* W. Gordon Hill, for the appellant Barnett; Lucien Fior, for the appellant Lipton; Cameron, Kemm & Co., for the appellants Garnham and Tilly; Kenneth Brown, Baker, Baker, for the appellant Platt; Lieberman, Leigh & Co., for the appellant Low; Henry Hilbery & Son, for the appellant Seckel; J. L. Freedman & Co., for the appellant Carmell.

1951.
*Apr.* 9, 10.

SIDNEY JOSEPH BARNETT.
JOHN LIPTON.
GEORGE BIRD GARNHAM.
FRANK WALTER TILLY.
SYDNEY WILLIAM PLATT.
REGINALD JAMES LOW.
FRANK MENO SECKEL.
JOEL CARMELL.

Oliver, J.,
Cassels, J.,
Sellers, J.

---

BEFORE

MR. JUSTICE OLIVER, MR. JUSTICE CASSELS AND MR. JUSTICE SELLERS.

---

## LESLIE HERITAGE.

1951.
*Apr.* 10

*Sentence—Corrective Training—Imprisonment—Concurrent Sentences Improper—Criminal Justice Act*, 1948 (11 & 12 *Geo.* 6, *c.* 58), *s.* 21 (1) (*b*).

A sentence of corrective training and a sentence of imprisonment ought not to be running at the same time.

*Quære*, whether the convictions on "two previous occasions" necessary to qualify an offender for a sentence of corrective training under section 21 (1) (*b*) of the Criminal Justice Act, 1948, must be convictions prior to the particular offence which brings the offender before the Court.

Appeal against sentence.

The appellant pleaded Guilty at Cambridgeshire Quarter Sessions on January 5, 1951, to larceny of a caravan in June, 1948, and asked for four other offences to be taken into

1951.
*Apr.* 10

LESLIE HERITAGE.

Oliver, J.,
Cassels, J.,
Sellers, J.

consideration. He was sentenced to three years' corrective training, to run concurrently with a sentence of eighteen months' imprisonment which he was already serving.

On September 6, 1949, the appellant had been placed on probation at Evesham Magistrates' Court for larceny of a caravan, and on October 9, 1950, he had been sentenced at Buckinghamshire Quarter Sessions to eighteen months' imprisonment for obtaining £5 by false pretences, and was serving that sentence when he appeared at Cambridgeshire Quarter Sessions on January 5, 1951. The Court treated that sentence and the previous probation order of 1949 as the convictions on two previous occasions necessary under section 21 (1) (*b*) of the Criminal Justice Act, 1948, to qualify him for corrective training.

*W. H. Hughes*, for the appellant.
*R. E. Seaton*, for the Crown.

CASSELS, J.: When this Court granted leave to the appellant to appeal against his sentence, it did so because it thought that there might well be an argument whether the convictions "on at least two previous occasions" referred to in section 21 (1) (*b*) of the Criminal Justice Act, 1948, had to be convictions prior to the particular offence which brought the appellant before the Court of Quarter Sessions.

The Court of Quarter Sessions came to the conclusion that the proper order to make was that the appellant should be sentenced to three years' corrective training, to be served concurrently with the sentence of imprisonment which he was already serving. This led to some confusion, because it is impracticable and wrong that there should be running at the same time a sentence of imprisonment and a sentence of corrective training. The two are almost contradictory in terms.

It has also been argued that the requirement of convictions on at least two previous occasions specified in section 21 of the Criminal Justice Act, 1948, may in certain circumstances be satisfied by showing that an offender who is before the Court

1951.
*Apr.* 10

LESLIE HERITAGE.

Oliver, J.,
Cassels, J.,
Sellers, J.

for punishment in respect of an offence prior to the two previous convictions, has by his subsequent offences and punishments shown the Court that, in the interests of society and his own interests as well, he ought to undergo a sentence of corrective training. That may be so, but this particular point does not call for decision in the present case, and the Court does not propose to decide it, leaving it to the exercise of the discretion of the Court before whom such an offender may come, whether in the particular circumstances of the case it is right to impose corrective training for an earlier offence by reason of the offender having subsequently been convicted the necessary number of times.

There are, however, special circumstances in the present case which enable the Court to review the sentence passed on the appellant. The Court has come to the conclusion that, if on October 9, 1950, he had asked the Court of Quarter Sessions for Buckinghamshire to take into consideration the offence in 1948, it might well be that he would not have appeared before Cambridgeshire Quarter Sessions to receive the sentence which is now under appeal. The Court, therefore, will substitute for the sentence of three years' corrective training a sentence of eighteen months' imprisonment, to date from October 9, 1950, to run concurrently with the sentence passed on the appellant on that date.

*Sentence varied.*

*Solicitors*: Wild & Hewitson, Cambridge, for the Crown.

[DIVISIONAL COURT CASE]

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE OLIVER AND MR. JUSTICE CASSELS.

1951.
*Apr.* 20.

## CREDLAND *v.* KNOWLER.

*Evidence—Child—Corroboration—Lie told by Defendant to Police—Children and Young Persons Act*, 1933 (23 *Geo.* 5, *c.* 12), *s.* 38 (1).

Where particular evidence requires corroboration, a lie told by the defendant to the police or before the commencement of the proceedings does not necessarily amount to corroboration. It may do so, and whether it does or not must depend on all the circumstances of the particular case. Such a lie will amount to corroboration if it is of such a nature, and made in such circumstances, as to lead to an inference in support of the evidence of the complainant, or if it gives to a proved opportunity a different complexion from what that opportunity would have borne had no such lie been told.

DAWSON *v.* MCKENZIE, 1908, 45 Sc. L. R. 474, and *dicta* in JONES *v.* THOMAS, [1934] 1 K. B. 323 at pp. 327 and 330, approved.

The appellant was charged with indecent assault on a girl R., aged ten. Unsworn evidence was given by R. and another girl aged nine that the appellant was cutting leaves in front of his house; that they came up and watched him, and one of them helped him to sweep the leaves; that the appellant then told them to meet him at some neighbouring pigsties, where he would take them to get some roses; that they walked with him along a path to a place known as the Hempdykes, where the appellant and R. sat down on the grass for a few minutes; and that there the appellant kissed R. and then indecently assaulted her. When seen by a police officer a week later and told of the allegation, the appellant twice denied that he had left his yard on the evening in question or been in the company of the girls afterwards. In answer to further inquiries, he said: "All right, I did just walk up to the top of the hill with them, but I didn't do anything", and, on being cautioned

1951.
*Apr.* 20.

CREDLAND *v.* KNOWLER.

Goddard, L.C.J., Oliver, J., Cassels, J.

he said: "I did go to the top of the hill at the back of my house with the two little girls. . . . We sat down on the grass for about only two minutes and I did kiss the girl of R.'s, but I didn't do anything else and I did not undo the front of my trousers; in any case there were too many people about. I didn't do any wrong to them". The appellant gave evidence, in which he substantially agreed with the story told by the girls apart from any allegation of indecency and admitted that he had never taken either of them for a walk before.

*Held*, that, in the circumstances of the case, the lie told by the appellant to the police was capable of being corroboration of the unsworn evidence of the girls.

*Per* the Lord Chief Justice: Apart from the lie told by the appellant, his statement under caution was in itself capable of affording corroboration, in that it showed that the children had been telling a perfectly true story up to the time of the actual offence.

Case stated by the Appeal Committee of Lincolnshire (Parts of Lindsey) Quarter Sessions.

At a Court of summary jurisdiction at Scunthorpe on July 26, 1950, an information was preferred by the respondent, Reginald Fred Knowler, superintendent of police, charging the appellant, Alfred Credland, with indecent assault on Jean Richardson, a girl aged ten, on June 19, 1950, contrary to section 52 of the Offences against the Person Act, 1861. The justices convicted the appellant and fined him £10. The appellant appealed against his conviction to Quarter Sessions, where, at the hearing before the appeal committee on October 6, 1950, the following facts were established, Jean Richardson and another girl, Sylvia Stark, aged nine (who both gave evidence unsworn), and Det.-Const. Trenholm having given evidence for the prosecution, and the appellant having given evidence on his own behalf:

On June 19, 1950, the two children watched the appellant cutting the hedge in front of his house and Sylvia Stark assisted him by brushing leaves. Immediately thereafter the appellant told the two children to meet him at some neighbouring pig-sties, when he would take them to get some roses. He met them there and walked with them along a path to a spot known

BIBL. LONDON

1951.
*Apr.* 20.

CREDLAND *v.* KNOWLER.

Goddard, L.C.J., Oliver, J., Cassels, J.

as the Hempdykes, where he kissed Jean Richardson. Thereafter, while the appellant and Jean Richardson were sitting side by side on the grass, the appellant opened his trousers, pulled Jean Richardson close to him and indecently assaulted her. (All the aforementioned findings of fact were based on the evidence of the two children.) On June 26, 1950, Det.-Const. Trenholm interviewed the appellant and told him that it was alleged that on the previous Monday, June 19, Jean Richardson and Sylvia Stark helped him to clear up hedge cuttings at the front of his house; that he (the appellant) suggested that the two children should accompany him to the Hempdykes; and that the two children accompanied him there, where he kissed Jean Richardson in the presence of Sylvia Stark and undid his trousers. The appellant replied: "I never left my yard after cutting the hedge". The detective-constable then said: "Did you not climb over your garden fence and go into the Hempdykes with the two girls?" and the appellant replied: "I deny that. I never left the yard. Some of them kids would get a man hung." The detective-constable then said: "Both these girls know you by name. I am satisfied that they were not mistaken when they say you went with them in the Hempdykes", and the appellant then replied: "All right. I did just walk to the top of the hill with them, but I didn't do anything". On being cautioned, the appellant said: "I did go to the top of the hill at the back of my house with the two little girls Stark and Richardson. We sat down on the grass for only two minutes, and I did kiss the girl of Richardson's, but I didn't do anything else and I did not undo the front of my trousers: there were too many people about. I didn't do any wrong to them."

The appellant was forty-seven years of age and a happily married man, and no previous allegation of indecency had been made against him. He had not taken either of the children for a walk on any previous occasion.

In his evidence, the appellant denied indecency throughout, but admitted that he had gone to the Hempdykes with the two

children and that he had kissed Jean Richardson once in a fatherly manner. The appeal committee came to no conclusion as to the manner of the kiss. The appellant's explanation of his denial to the detective-constable (which explanation the appeal committee did not accept) was that he did not tell the truth at once because he was afraid that it would upset his wife.

On behalf of the appellant it was contended that there was no evidence corroborative of the evidence of the children and that the appellant's denial of facts which he subsequently admitted was consistent with the conduct of an innocent man who was shocked by the allegation made against him and did not desire his wife to hear of it.

On behalf of the respondent it was contended that the appellant's admittedly deliberate and untrue denial of a material fact in the story alleged against him was corroborative evidence entitling the appeal committee to act on the evidence of the two children.

The appeal committee, being of opinion that there was corroborative evidence, namely, the appellant's deliberate and untrue denial of a material fact in the story alleged against him, entitling them to act on the evidence of the two children, which they believed, dismissed the appeal against conviction (subject to the Case stated), and varied the sentence to one of three months' imprisonment.

*John Hobson*, for the appellant:

A lie told by a defendant prior to the proceedings is not in itself corroboration: JONES *v.* THOMAS, [1934] 1 K. B. 323. It can be so only where it affords clear proof that the evidence required to be corroborated is true. The lie told by the appellant in the present case could at the most have the effect only of arousing suspicion and of detracting from the value of his own evidence. There was never the slightest admission of indecency by him, and the appeal committee expressly refrained from coming to any conclusion as to the nature of the kiss.

1951.
*Apr.* 20.

CREDLAND *v.* KNOWLER.

Goddard, L.C.J., Oliver, J., Cassels, J.

*T. R. Fitzwalter Butler*, for the respondent:

A lie told by a defendant is not necessarily corroboration, but may be in some cases, and a distinction is to be drawn between a lie relating to some collatëral matter and a lie which goes to the root of the story told by the complainant, as the lie in the present case did. This lie fits exactly with the test adopted in JONES *v.* THOMAS, *supra*, by the Lord Chief Justice (Lord Hewart) at p. 327 in that it led to an inference in support of the evidence of the children when they said that the association between them and the appellant was a guilty one, and also with the test adopted by Lawrence, J., at p. 330, approving the Scottish decision of DAWSON *v.* MCKENZIE, 1908 Sc. L. Rep. 474, in that it gave to an opportunity proved by independent evidence a different complexion from what the opportunity would have borne had no lie been told. Further, quite apart from the lie told by the appellant, there was corroboration to be found in the appellant's own statement under caution and evidence in that he admitted associating with the children in peculiar circumstances and substantially admitted that the whole of their story up to the time of the commission of the indecent act was true.

*John Hobson* replied.

THE LORD CHIEF JUSTICE: This is a case stated by the Appeal Committee for the County of Lincoln (Parts of Lindsey), to whom the appellant appealed against a conviction by the Scunthorpe justices for an indecent assault on a child. The justices had found him Guilty and fined him £10. The Appeal Committee of Quarter Sessions affirmed the conviction and substituted a sentence of imprisonment for the fine, which clearly they most properly did if they held the appellant to be Guilty. A fine of £10 for indecently assaulting a child is not a proper penalty; imprisonment is the only sentence for such an offence.

The question raised in the Case is whether or not there was any corroborative evidence of that of two children, who,

1951.
*Apr.* 20.

CREDLAND *v.* KNOWLER.

Goddard, L.C.J., Oliver, J., Cassels, J.

although they were ten years old and nine years old respectively, were found by the appeal committee not to understand the nature of an oath, and therefore gave their evidence unsworn. Section 38 (1) of the Children and Young Persons Act, 1933, provides: " . . . where evidence admitted by virtue of this section is given on behalf of the prosecution the accused shall not be liable to be convicted of the offence unless that evidence is corroborated by some other material evidence in support thereof implicating him ".

The evidence of the children in effect was, that the appellant was cutting a hedge in front of his house and the children came up and watched him, and one of them swept up some of the leaves for him. Then he told them to meet him at some nearby pigsties, when he would take them to get some roses, and he did meet them there. He did not, therefore, go with them openly, so that they could be seen together going, to the place where the roses were. They then walked with him along a path to a spot known as the Hempdykes, where he proceeded to kiss one of them and later committed the assault on her. When he was seen by a police officer a few days afterwards, he denied that he had ever been with the children at all. He did not deny that the children were there when he was cutting his hedge, but he said: " I never left the yard after cutting the hedge ". The officer then asked him: " Did you not climb over your garden fence and go into the Hempdykes with the two girls? ", and he replied: " I deny that. I never left the yard. Some of them kids would get a man hung ". The officer then said: " Both these girls know you by name. I am satisfied that they were not mistaken when they say that you were with them in the Hempdykes ", and then the appellant replied: " All right, I did walk just to the top of the hill with them, but I didn't do anything ". The position might be different if the evidence stopped there, but it did not, for, on being cautioned, he then said: " I did go to the top of the hill at the back of my house with the two little girls Stark and Richardson. We sat down on the grass for about only two minutes, and I did kiss the girl of Richardson's, but I didn't

1951.
*Apr.* 20.

CREDLAND *v.* KNOWLER.

Goddard, L.C.J., Oliver, J., Cassels, J.

do anything else and I did not undo the front of my trousers, in any case there were too many people about. I didn't do any wrong to them ".

What this Court has to decide is whether or not there was evidence which could corroborate the evidence of the children, because, if there was such evidence, it was for the appeal committee to decide whether they regarded it as corroboration. That is always the position when an appeal is brought on the question of corroboration, whether in a case tried before a jury or by justices. It is not for this Court to say whether the tribunal of fact ought to be satisfied. We have to decide whether the evidence given is such as in law can be regarded as corroboration; and it is for the tribunal of fact, the jury or justices, whichever it may be, to decide for themselves whether it did corroborate. Because there is evidence which may corroborate, it does not follow that the jury or justices are bound to find that it did corroborate. In the case of an appeal to an appeal committee, the prosecution could not apply for a Case on the ground that the appeal committee ought to have been satisfied, although the appeal committee can state a Case on the question whether there was evidence which could be corroboration.

In this case the appeal committee came to the conclusion that the evidence of the children was corroborated, and we have to decide whether the facts were such that they could regard them as corroboration if they believed them.

It seems to me that there are two quite distinct issues here. Most of the argument and, no doubt, much of the Case, has dealt with the lie which the appellant told and the question whether the fact that the appellant told a lie is in itself corroboration. I should be very sorry to lay down, and I have no intention of laying down and I do not think any case has gone the length of laying down, that the mere fact that an accused person has told a lie can in itself amount to corroboration. It may, but it does not follow that it must. If a man tells a lie when he is spoken to about an alleged offence, the fact that he tells a lie at once throws great doubt upon his evidence, if he

1951.
*Apr.* 20.

CREDLAND *v.* KNOWLER.

Goddard, L.C.J., Oliver, J., Cassels, J.

afterwards gives evidence, and it may be very good ground for rejecting his evidence, but the fact that his evidence ought to be rejected does not of itself amount to there being corroboration. In fact, I do not think we can put the proposition better than it was put by Lord Dunedin in DAWSON *v.* MCKENZIE, 1908 45 Sc. L. Rep. 474, and the passage to which I am about to refer was approved by this Court in JONES *v.* THOMAS, [1934] 1 K. B. 323. Lawrence, J., giving judgment, with which Avory, J., concurred, and which certainly had the approval of the Lord Chief Justice (Lord Hewart), said (at p. 330): "'Mere opportunity alone does not amount to corroboration, but two things may be said about it. One is, that the opportunity may be of such a character as to bring in the element of suspicion. That is, that the circumstances and locality of the opportunity may be such as in themselves to amount to corroboration. The other is, that the opportunity may have a complexion put upon it by statements made by the defender which are proved to be false. It is not that a false statement made by the defender proves that the pursuer's statements are true, but it may give to a proved opportunity a different complexion from what it would have borne had no such false statement been made'". That is a very concise and clear statement of the law.

In that same case the Lord Chief Justice (Lord Hewart) referred to that case and said (at p. 327): "But as I read those *dicta* it is only when the untrue statements are of such a nature, and made in such circumstances, as to lead to an inference in support of the evidence of the mother"—that was a bastardy case—"that they can be regarded as corroborative evidence, and not that the mere fact of the alleged father having knowingly made false statements is in itself corroboration within the statute". In other words, one has to look at the whole circumstances of the case. What may afford corroboration in one case may not in another. It depends on the nature of the rest of the evidence and the nature of the lie that was told.

In this case, speaking for myself, I am prepared to hold

1951.
*Apr.* 20.

CREDLAND *v.* KNOWLER.

Goddard, L.C.J., Oliver, J., Cassels, J.

that there was corroborative evidence, and I think strong corroborative evidence, apart from the lie which the appellant told. He told a lie first of all by saying that he was not there at all with the children. Then he admitted that he was there, and finally said: "I did go to the top of the hill at the back of my house with the two little girls Stark and Richardson. We sat down on the grass for about only two minutes, and I did kiss the girl of Richardson's, but I didn't do anything else and I did not undo the front of my trousers, in any case there were too many people about. I didn't do any wrong to them". As has been pointed out over and over again, where the question is whether a person's evidence is corroborated, the whole story has not to be corroborated, because if there is evidence independent of the person whose evidence requires corroboration which covers the whole matter, there is no need to call that first person at all. The evidence has only to be corroborated "in some material particular" under section 4 of the Bastardy Laws Amendment Act, 1872, and in the present case "by some other material evidence". Of course, the appellant's own statement is material evidence and it seems to me that the statement which he made was most material and did afford strong corroboration. It did not corroborate the whole of the children's story, but it corroborated the children's story to such an extent that it showed that the appellant, who had never taken either of these children for a walk before, had gone with them to the place to which they said he took them, that he sat down not for the purpose of resting or telling them a story or anything like that, merely for two minutes, and then kissed one of them. That seems to me to be the strongest corroboration of the children's evidence that he not only did that, but went on to do something further, because it shows that the children had been telling a perfectly true story up to the time when he said that he did not do anything and they said that he did.

The lie which he told, in my opinion, would come within the *dictum* of Lord Dunedin which I have read. But for myself I do not want to lay down any particular proposition

1951.
*Apr.* 20.

CREDLAND *v.* KNOWLER.

Goddard, L.C.J., Oliver, J., Cassels, J.

of law with regard to the lie, except to say that I entirely agree with what was said in JONES *v.* THOMAS (*supra*), approving DAWSON *v.* MCKENZIE (*supra*). I should prefer to say that the statement which the appellant made, which I have already read, in itself afforded corroboration and that therefore this appeal fails.

OLIVER, J.: I agree. I think the right conclusion is this, that whether a false statement is or is not corroboration must depend on all the circumstances of the case. A lie in itself in some circumstances might be corroboration; in other circumstances it obviously would not. It is impossible to say more than that each case in this respect must turn on its own facts.

CASSELS, J.: I agree, and there is nothing I wish to add.

*Appeal dismissed.*

---

*Solicitors*: Davies, Arnold & Cooper, for T. J. Lewis, Scunthorpe, for the appellant: Bird & Bird, for Sergeant & Collins, Scunthorpe, for the respondent.

---

BEFORE

MR. JUSTICE CASSELS, MR. JUSTICE BYRNE AND MR. JUSTICE STREATFEILD.

---

## ROBERT JAMES LUMSDEN.

1951.
*May* 7.

*Being Found by Night in a Building—Prisoner Seen Running from Open Doorway of Building—Larceny Act*, 1916 (6 & 7 *Geo.* 5, *c.* 50), *s.* 28 (4).

1951.
*May* 7.

ROBERT JAMES LUMSDEN.

Cassels, J.,
Byrne, J.,
Streatfeild, J.

By section 28 of the Larceny Act, 1916: "Every person who shall be found by night . . . (4) in any building with intent to commit any felony therein; shall be guilty of a misdemeanour . . .".

The above section does not mean that the alleged offender need necessarily be apprehended in the building, or that the finder must also be in it, but it does mean that there must be clear and unmistakable evidence that the alleged offender has been found in the building.

Two police officers, about midnight, saw the appellant walk into an alley by the side of a cinema and enter a doorway, which was one of its side exits, the doorway being in a slight recess. Two minutes afterwards they saw a light appear and when they reached the exit doors they were both open. They searched inside the cinema but did not find the appellant. Sometime afterwards one of the officers saw the appellant running at full speed from the open doorway, and both chased and caught him. The appellant denied that he had been in the cinema. The appellant was convicted of being found by night in the cinema with intent to steal.

*Held*, that there was no evidence that the appellant had been "found in" the building within the meaning of the above section and that the conviction must be quashed.

PARKIN, 34 Cr. App. R. 1; [1950] 1 K. B. 155, applied.

Appeal against conviction.

The appellant was convicted at the County of London Sessions on February 28, 1951, of being found by night in a building with intent to steal, contrary to section 28 (4) of the Larceny Act, 1916, and was sentenced by the Deputy Chairman to six months' imprisonment.

The facts are set out fully in the headnote and the judgment.

*J. C. Stewart*, for the appellant:

There was no evidence that the appellant was "found in" the cinema within the meaning of section 28 (4). The section is to be construed strictly, and its language given its ordinary meaning: PARKIN, 34 Cr. App. R. 1; [1950] 1 K. B. 155. "Found in" must mean either (1) apprehended in; or (2) seen in; or (3) proved to have been in, and whichever interpretation is given to the words, the evidence fell short of the requirements of the section.

1951.
*May 7.*

ROBERT JAMES LUMSDEN.

Cassels, J., Byrne, J., Streatfeild, J.

*J. N. Hutchinson*, for the Crown:

It is true that there was no direct evidence that the appellant was actually seen in the building; but, in view of the evidence of the police officers that he was seen running at full speed from the open doorway, there was an irresistible inference of fact that he had been inside.

CASSELS, J.: This appellant was convicted of being found by night in a building with intent to steal. Section 28 of the Larceny Act, 1916, provides: "Every person who shall be found by night . . . (4) in any building with intent to commit any felony therein; shall be guilty of a misdemeanour . . .". He was given leave to appeal against that conviction, but does not appeal against his sentence, which was one of six months' imprisonment.

On January 10, 1951, about midnight, two police officers saw the appellant, who was alone, cross the New Kent Road and walk into an alley by the side of a cinema and enter a doorway which is one of the side exits of the cinema. The doorway is in a slight recess. Two minutes afterwards they saw a light appear, and when they reached the exit doors they were both open. They went inside and searched with somebody for the appellant and did not find him. They, therefore, kept observation on the alley, and sometime afterwards one of them saw the appellant running, as he described it, at full speed from the open doorway. Both officers pursued the appellant and caught him after about a 200 yards' chase, but the appellant at once denied that he had been near the cinema. On the way to the station in the police van, according to the evidence of the police officers, the appellant said: "Can't you forget what you saw? I did not have time to do any villainy". When charged, he said that he had been in the company of a woman. There was no sign of any forcible entry. The appellant denied that he was running or that he had made the observation about villainy.

This case calls for a consideration, as a matter of law, of the meaning of the words "found by night . . . in". There

1951.
*May* 7.

ROBERT JAMES LUMSDEN.

Cassels, J.,
Byrne, J.,
Streatfeild, J.

is no question here about the night; the two important words are "found in". Mr. Stewart has put forward three propositions on behalf of the appellant: (1) that the words mean apprehended in, or (2) mean seen in, or (3) mean proved to have been in the premises.

This Court has already considered this particular section of the Larceny Act, 1916, in PARKIN, 34 Cr. App. R. 1; [1950] 1 K. B. 155. In that case the appellant was seen halfway up some piping at the side of the building with his foot on the junction of the pipe and his head and shoulders near a window. The police officer could not see clearly, but it appeared to him that the appellant had one of his hands through the window for the purpose of pulling himself into the building. It was held in that case that the language of the section must be given its ordinary meaning and that, as the appellant had been found not in the building but outside, trying to get into it, he was not guilty of an offence against this particular section.

Applying the principle of that case to the present case, there was here no evidence fit for the consideration of the jury that the appellant was found in the building. There may be evidence from which it would be reasonable to infer that he must have been in if he was seen coming out, but that is not the proper interpretation of this section. If "found in" means what it says, it does not necessarily mean that the person charged must be caught in or apprehended in, or that the finder should also be in the building as well, but it does mean, and can only be taken to mean, that, if a person is to be convicted of an offence against this section, there must be clear and unmistakable evidence that he has been, as the section says, found in the building. There was no such evidence in this case. The evidence could have been reasonably interpreted that the appellant had been inside the building, but there was no evidence from either police officer that he had been seen in the building. He had certainly been seen at the doorway, but there was no evidence that he was found in the building.

In those circumstances this Court has come to the conclusion that this conviction must be quashed and the appellant must be set free.

*Conviction quashed.*

1951.
*May* 7.

ROBERT JAMES LUMSDEN.

Cassels, J., Byrne, J., Streatfeild, J.

*Solicitors*: Hawker & Wheatley, for the appellant; Solicitor for Metropolitan Police, for the Crown.

---

CIRCUIT CASE (OXFORD CIRCUIT)
SALOP ASSIZES.

BEFORE

MR. JUSTICE MORRIS.

---

## REX *v.* WOOD.

1951.
*Feb.* 26, 27

*Evidence — Character — Robbery with Violence — Suggestion of Indecent Conduct by Prosecutor at Time of Alleged Offence— Evidence of General Good Character of Prosecutor—Admissibility.*

On the trial of the prisoner on charges of robbery with violence and assault occasioning actual bodily harm, the prosecutor was asked in cross-examination whether at the time of the alleged offences he had made an indecent suggestion and behaved indecently towards the prisoner. The prosecutor denied the suggestions. Counsel for the Crown desired to call evidence to prove that the prosecutor was a person of good general reputation.

*Held*, that the evidence was not admissible.

Trial before Morris, J., at Salop Assizes.

The prisoner, Leonard Wood, was charged with robbing one C. on November 24, 1950, of £1 3s. and at the time of the robbery using personal violence to C. and also with on the same occasion assaulting C., thereby occasioning him actual bodily harm. It was suggested to C. in cross-examination by counsel for the prisoner that on the occasion of the alleged

1951.
*Feb.* 26, 27

REX *v* WOOD

Morris, J

offences C. had made an indecent suggestion to the prisoner and indecently assaulted him. C. denied the allegations. Counsel for the Crown indicated that he desired to call evidence to prove that C. was a person of good general reputation.

*Norman Carr*, for the prisoner, submitted that the evidence was not admissible, as he had not sought to put C.'s general character and reputation in issue and that the admission of evidence of C.'s general reputation would prejudice the jury in his favour and against the prisoner.

*J. Field Hunt*, for the Crown, submitted that it was relevant for the jury to know what kind of reputation C. bore, and that there was an analogy between the present case and a case of rape, in which the defence of consent was raised, where it was usual to ask what kind of reputation the prosecutrix bore.

MORRIS, J., ruled that the evidence was inadmissible.

*Solicitors:* David Harris, Shrewsbury, for the prisoner; G. C. Godber, Shrewsbury, for the Crown.

---

BEFORE

MR. JUSTICE HUMPHREYS, MR. JUSTICE HILBERY AND MR. JUSTICE BYRNE.

---

1951.
*April* 30;
*May* 1, 8.

## FRAMROZE PATEL.

*Evidence — Admissibility — Proper Procedure — Issue not to be Decided before Case Opened — Purchase Tax — Fraudulent Evasion — Evidence Relating to Similar Transaction not Charged.*

Where defending counsel has informed counsel for the prosecution that he intends to object to the admissibility of certain evidence, as a general rule, the proper course is that counsel for the prosecution should refrain from referring to the

1951.
*April* 30;
*May* 1, 8.

FRAMROZE PATEL.

Humphreys, J., Hilbery, J., Byrne, J.

evidence in his opening, and that the issue of admissibility should not be decided until the appropriate moment in the case when the evidence is tendered, and it is important that this rule should be followed.

COLE (1941), 28 Cr. App. R. 43, HAMMOND (1941), 28 Cr. App. R. 84, and ZIELINSKI, 34 Cr. App. R. 193; [1950] W. N. 494, followed.

The appellant was charged with conspiring to be knowingly concerned in the taking of steps with a view to the fraudulent evasion of purchase tax and with fraudulent evasion of purchase tax in respect of nylon stockings. The case for the prosecution was that the appellant, with the assistance of S., who was a director of a company, which was insolvent but was registered for purchase tax, used the company for the purpose of obtaining without payment of purchase tax large supplies of nylon stockings, which were at once consigned to persons who were not registered traders and were buying for the home market. The appellant's case was that he had been deceived by S. and did not know that S. was evading tax and that he was ignorant of the nature of the transactions. The prosecution called two witnesses who gave evidence relating to a transaction not referred to in any of the counts of the indictment. The witnesses deposed that the appellant went to the place of business of one of them representing himself as the buying agent of a firm which he named, and gave an order and paid for a large number of nylon stockings to be delivered to certain packers, saying that the stockings were required for export.

*Held*, that the evidence was relevant and admissible.

Appeal against conviction.

The appellant was convicted at the Central Criminal Court on December 18, 1950, after a trial lasting nine days, of conspiracy to be fraudulently concerned in the taking of steps to evade purchase tax and of fraudulent evasion of purchase tax and was sentenced by the Commissioner to two years' imprisonment and twelve months' imprisonment (consecutive) and to fines of £200 on each of six counts.

The following statement of facts is, in substance, taken from the judgment.

The appellant was indicted with three other persons, Shamas, Ali and Dean and a company called Welford Hawes & Co., Ltd. The indictment contained six counts. In the first

1951.
*April* 30;
*May* 1, 8.

FRAMROZE PATEL.

Humphreys, J., Hilbery, J., Byrne, J.

count the appellant, the three individuals and the company were charged with conspiring together and with two other persons, Gerard Peter Scott and Sher Mohamed, and with other persons unknown to be knowingly concerned in the taking of steps with a view to the fraudulent evasion of purchase tax in respect of nylon stockings. In the second count the appellant, Shamas, and the company were charged with the fraudulent evasion of purchase tax in respect of 1,320 pairs of nylon stockings on September 15, 1949. In the third count, the appellant, Shamas, Dean and the company were charged with a similar offence in respect of 6,000 pairs on October 2, 1949. In the fourth count the appellant, Ali, Dean and the company were charged with a similar offence in respect of 6,000 pairs on November 9, 1949. In the fifth count the appellant, Ali, Dean and the company were charged with a similar offence in respect of 1,560 pairs on November 11, 1949. In the sixth count the appellant and the company were charged with a similar offence in respect of 1,836 pairs on January 3, 1950. All the persons charged were convicted on all counts on which they were charged, except that, by the direction of the Commissioner, Dean was acquitted on the third count.

The case for the prosecution was that the appellant, with the assistance of Gerard Peter Scott, who was a director of Welford Hawes & Co., Ltd., used that company, which was insolvent but was registered for purchase tax, for the purpose of obtaining without payment of purchase tax large supplies of nylon stockings, which were at once consigned to persons who were not registered traders and were not buying for export, but for sale on the home market. The appellant's case was that he had been deceived by Scott, that he did not know that Scott was evading the payment of purchase tax, and that he did not know, except in one instance, that the goods were nylon stockings or that they were being sold to unregistered traders for sale on the home market.

At the trial the prosecution called evidence with regard to another transaction by the appellant which was not the subject of any of the counts in the indictment. Two persons gave

evidence that on May 23, 1949, the appellant went to the place of business of one of them, representing himself as the buying agent for a firm called the Central Oriental Agency, and gave an order and paid for 1,100 dozen pairs of nylon stockings to be delivered to certain packers, saying that they were required for export to Pakistan.

*J. F. H. Platts-Mills*, for the appellant.
*J. M. G. Griffith-Jones*, for the Crown.

*May* 8.—The judgment of the Court was read by :

BYRNE, J. : Before dealing with the facts of this appeal, the Court desires to impress on those who are concerned with the administration of criminal law the necessity of adhering to the practice referred to in COLE (1941), 28 Cr. App. R. 43, approved in HAMMOND (1941), 28 Cr. App. R. 84, and stated to be the only proper course in an ordinary case in ZIELINSKI, [1950] W. N. 494 ; 34 Cr. App. R. 193. As stated in the headnote to the last-mentioned case in *The Criminal Appeal Reports* : " Where defending counsel has informed counsel for the prosecution that he intends to object to the admissibility of certain evidence, it is, as a general rule, undesirable that the argument on admissibility should be heard and the issue decided before the case is opened. The proper course is for counsel for the prosecution to refrain from referring to the evidence in his opening, and that the issue should be decided at the appropriate moment in the case when the evidence is tendered ". The present case is a good example of the confusion likely to arise from the modern practice pursued in the present case of inviting the Judge to rule on the admissibility of evidence expected to be given, the relevance of which may well be affected by other evidence in the case. In point of fact, the full evidence opened to the jury by permission of the Commissioner was never given at all, but a small and, as we think, innocuous instalment was given and the accuracy of that evidence was not disputed. We further think it well to

1951.
*April* 30;
*May* 1, 8.

FRAMROZE PATEL.

Humphreys J.,
Hilbery, J.,
Byrne, J.

remind those who prosecute, as well as those who try, long criminal cases that complication is a weapon for the defence. The fewer and simpler the issues left to the jury, the less chance there is of a miscarriage of justice. With all deference to the very experienced Commissioner who tried this case, and who was plainly doubtful whether further evidence should be admitted, there is an ancient maxim that the accused person is entitled to the benefit of any doubt.

[After referring to the facts as set out above, his lordship continued:] There was abundant evidence that the appellant had financed the purchase of nylon stockings by Welford Hawes & Co. and that he had arranged the transport of goods which had gone to unregistered traders in this country and, in the circumstances, it would be surprising if a jury failed to draw the inference that he had full knowledge of the transactions and knew perfectly well that the payment of purchase tax was being evaded. Nevertheless, the prosecution were not content to rest their case on that evidence and called witnesses with regard to another transaction in which the appellant took part, but which was not the subject of any of the counts in the indictment. That transaction related to a firm called Central Oriental Agency and the evidence established the fact that on behalf of that firm the appellant placed orders for nylon stockings for which he paid.

The appellant, with leave of the Court, now appeals against conviction on the ground that the evidence with regard to that other transaction was inadmissible. The Court was, therefore, left in the position of trying to steer between the Scylla of releasing to the world unpunished an obviously guilty man and the Charybdis of upholding the conviction of a possibly innocent one. In such a case the Court would lean to the more merciful course, since it is better to release the guilty than to run the risk of convicting the innocent.

It is unnecessary to deal with the transaction relating to the Central Oriental Agency in detail. It is sufficient to say that two witnesses were called with regard to it—Mr. Triggs and Mr. Holdcroft. In our view, the question whether the

1951.
*April* 30;
*May* 1, 8.

FRAMROZE PATEL.

Humphreys, J.,
Hilbery, J.,
Byrne, J

evidence of Mr. Triggs and Mr. Holdcroft was admissible may be dealt with shortly. That the case against the appellant without that evidence was an almost conclusive one we have no doubt; that the evidence of those two witnesses made it no stronger we are also agreed, for all they proved was that on May 23, 1949, the appellant went to the place of business of Mr. Triggs, representing himself as the buying agent of the Central Oriental Agency, the principal of that firm being a Mr. Sastry, and gave an order for 1,100 dozen pairs of nylon stockings to be delivered to certain packers. Mr. Triggs communicated with his principals, the manufacturers, who accepted the order. The goods were said to be required for export to Pakistan, and some of them at least were not suitable for the English market owing to their garish colours. The goods were paid for by the appellant by a banker's draft for £3,993. What became of the bulk of that order was never proved.

We are not concerned with the object of the prosecution in calling that evidence. Counsel, in opening, suggested that it would be admissible on one of the grounds mentioned by Lord Sumner in THOMPSON *v.* DIRECTOR OF PUBLIC PROSECUTIONS, 13 Cr. App. R. 61, at p. 78; [1918] A. C. 221, at p. 232, as tending to prove guilty knowledge or system. If the whole of the evidence had been called, it might have been, but the evidence of the two witnesses called failed to carry the case far enough. The doctrine there referred to relates solely to the proof of other crimes committed by the accused person. The doctrine applicable to this case is the far older one that no irrelevant evidence should be admitted in a criminal case. In our opinion, from that point of view, it cannot be said that the evidence was irrelevant. The case against the appellant was that he financed the three deals which were the subject of counts two to six of the indictment. Here was another case in which he was financing another concern to the tune of £4,000. Since his business apparently consisted of financing other companies with which he was not directly concerned in cases in which those companies were placing orders for nylon stockings which purported to be orders for export, could the jury believe

1951.
*April* 30;
*May* 1, 8.

FRAMROZE PATEL.

Humphreys, J., Hilbery, J., Byrne, J

that in the cases charged he in fact made no inquiries and took no interest in what became of the goods ordered and paid for by him? The jury might well take the view that, the more instances of his financing proved, the less could they accept his explanation. We are not prepared to hold that the evidence of the two persons named was irrelevant.

[The learned Judge referred to the summing-up, and continued:] That there was a fraudulent evasion of purchase tax was apparently admitted. In such a case the man who financed the deal, including the transport of goods to English destinations, will naturally be regarded as at the head of the conspiracy. The appellant's defence did not deny the facts. His case was "I got the money from Scott", which the jury may well have considered afforded no answer to the charge when the evidence of the relationship which existed between Scott and the appellant is considered. Scott and the appellant were co-directors of Scott Mills & Co., Ltd. from June 28, 1949, and on July 15 Mr. Phillips, a senior investigating officer of Customs and Excise, spoke to Scott about purchase tax which was payable on nylon stockings acquired by Scott Mills & Co., Ltd. On August 18, Mr. Phillips told the appellant on the telephone that he wished to see him as it appeared that Scott Mills & Co. owed £2,000 purchase tax, to which the appellant replied that he had financed some of the company's purchases, but had dealt with the manager Scott. Not only were the appellant and Scott co-directors of Scott Mills & Co., Ltd., but on August 20 Scott became a director of Welford Hawes & Co., Ltd., and less than a month later—on September 15—the appellant ordered transport for the first consignment of nylon stockings ordered by Welford Hawes & Co.

For these reasons we have come to the conclusion that the evidence with regard to the other transaction was admissible, and the appeal is, therefore, dismissed.

*Appeal dismissed.*

---

*Solicitors:* Hart-Leverton & Co., for the appellant; The Solicitor, Customs and Excise, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE LYNSKEY AND MR. JUSTICE DEVLIN.

---

## JAMES LOUGHLIN.

1951.
*June 4.*

*Breaking and Entering—Prisoner Found in Possession of Stolen Property soon after Breaking—Verdict of Housebreaking Open to Jury.*

Where it is proved that premises have been broken into and property stolen therefrom, and that very soon after the breaking the prisoner has been found in possession of that property, it is open to the jury to find the prisoner guilty of breaking and entering, and the jury should be so directed.

Application for leave to appeal against conviction.

The applicant was convicted at East Kent Quarter Sessions on April 2, 1951, of receiving stolen property, and was sentenced by the Deputy-Chairman to six years' preventive detention.

On the night of January 25–26, 1951, the pavilion of the Ashford Golf Club was broken into and a bottle of whisky and a bottle of cherry brandy stolen. On the early morning of January 26, within an hour or two of the breaking, the applicant was stopped in Ashford by a police officer and the two bottles were found in his attaché-case. The applicant said that he had walked from London, and that he had bought the bottles with others for £5 from a man whom he had never met before, and whose name he did not know. The Deputy-Chairman directed the jury not to consider the first count of the indictment which charged the applicant with pavilion-breaking and larceny and to concentrate on the second count, which charged him with receiving stolen property.

No counsel appeared.

1951.
*June* 4.

JAMES LOUGHLIN.

Goddard, L.C.J., Lynskey, J., Devlin, J.

THE LORD CHIEF JUSTICE: The applicant was indicted at the East Kent Quarter Sessions for having broken and entered a pavilion of the Ashford Golf Club and stolen a bottle of whisky and a bottle of cherry brandy, and on a second count he was charged with having received the property. The evidence in the case was of the simplest possible description. On the night of January 25–26, 1951, the Golf Club pavilion at Ashford was broken into and the two bottles which were afterwards found in the applicant's possession were stolen. About 5 o'clock in the morning of the 26th the applicant was stopped in Ashford by a police officer, and both the bottles were found in his attaché-case. He was stopped within an hour or two of the property having been stolen from the Golf Club. Then the applicant told a preposterous story of how he had walked from London and gone to sleep in a hedge outside Ashford; and to account for the fact that he had the two bottles with him he said that he had bought them from a man for £5 outside a public-house which he thought was Lewisham way and he said that he got not only a bottle of brandy and a bottle of whisky but also a bottle of rum and another small bottle; that was, I suppose, to support the story that he had paid £5 for the spirits. It was a story which the learned Deputy-Chairman described as " the old and hackneyed story "—the sort of story which is put forward when a man is found in possession of stolen goods.

The learned Deputy-Chairman started his summing-up by saying this: " There is no evidence that he in fact was the person who broke into these premises, except the fact that he was found in recent possession of this stolen property, if you find that proved. Therefore, to simplify matters, I shall not ask you for a verdict on the first count, and you will concentrate on the second count of receiving ". Now, it is too often the case, where a man is charged with housebreaking and the evidence against him is that soon after the breaking and entering he is in possession of the property, that the Court directs the jury that there is no evidence that he broke and entered and tells the jury to concentrate on the receiving.

That is not the law. If it is proved that premises have been broken into, and that certain property has been stolen from those premises, and that very shortly afterwards a man is found in possession of that property, that is certainly evidence from which the jury can infer that he is the housebreaker or shopbreaker and; if he is, it is inconsistent to find him guilty of receiving, because a man cannot receive from himself. That is what is so often done. It is perfectly good evidence of the prisoner being the housebreaker that he is found in possession of property stolen from a house quite soon after the breaking.

In this case we do not propose to interfere with the conviction because the applicant's defence was that he received the property from a man in circumstances which, if true, clearly showed guilty knowledge on his part, or at least, would entitle a jury to infer guilty knowledge. If a man is found in possession of stolen property in Ashford and to account for his possession says that he got it in London, and bought it from a man whom he has never seen before, cannot describe, and whose name he does not know, the jury could, of course, find that he received it knowing it to have been stolen; but in this case I do not think there is any doubt that if the jury had been left to find a verdict upon the charge of pavilion-breaking they probably would have found that the applicant was guilty on that charge, and the conviction certainly would not have been interfered with by this Court.

I therefore hope that Courts will not think it necessary, when the only evidence against a prisoner is that he is found in possession of property which has been recently stolen from a house recently broken into, to direct the jury that that is not evidence upon which they can find a verdict on the house-breaking. This application is refused.

*Application refused.*

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE LYNSKEY AND MR. JUSTICE DEVLIN.

1951.
*June 4.*

## RICHARD DUNCAN ARMSTRONG.

*Newspaper Report—Application for Bail—Reference to Previous Convictions—Not Necessarily Ground for Quashing Conviction.*

The fact that a newspaper, either local or national, has reported the prisoner's application for bail in the magistrates' Court and has referred to the mention of previous convictions of the prisoner to the magistrates, although such a disclosure in the Press is undesirable, is not in itself a ground for quashing the conviction in a case where the evidence of the prisoner's guilt is clear.

DYSON (1943), 29 Cr. App. R. 104, referred to.

Application for leave to appeal against conviction.

The applicant was convicted at Surrey Quarter Sessions on January 19, 1951, on two charges of larceny in a dwelling-house and was sentenced by the Chairman to four years' corrective training.

The applicant had applied to the magistrates for bail, and in the course of the application the magistrates were informed of previous convictions of the applicant. Reports of the hearing subsequently appeared in various Surrey newspapers, and reference was made therein to the mention of previous convictions to the magistrates.

*John Harrington*, for the applicant:

The applicant's trial was prejudiced by the disclosure of his previous convictions in local newspapers, which it is likely that the jury who tried him would have read. This was particularly unfortunate in view of the fact that the reports of the proceedings were not entirely accurate. DYSON (1943), 29 Cr. App. R.

1951.
*June* 4.

RICHARD DUNCAN ARMSTRONG.

Goddard, L.C.J., Lynskey, J., Devlin, J.

104, is an authority for the proposition that in circumstances such as these, by reason of the inevitable prejudice created, a conviction should not be allowed to stand.

No counsel appeared for the Crown.

LYNSKEY, J.: In this case the applicant is applying for leave to appeal against a conviction at Surrey Quarter Sessions on two charges of larceny in a dwelling-house, for which he received a sentence of four years' corrective training. Originally he appealed both against conviction and sentence, but he has withdrawn his appeal against sentence. His appeal was based upon the fact that his defence was not put fully before the Court, that he did not steal the goods but that they were given to him to sell, and that he had in fact gone straight since his last conviction. The original grounds of appeal have not been pursued by counsel in this Court. The point which has been taken was raised by the applicant in a letter sent afterwards, and that point was the fact that he had previous convictions "was mentioned in the newspapers *Epsom Herald and Gazette*, *Surrey Advertiser*, and several Surrey papers", some of which may have been read by the jury of his trial and would prejudice them against him.

The facts of the case were really clear. The applicant pretended to be a Commander in the Canadian Merchant Navy, and under that pretence he made the acquaintance of a Mrs. Hardy who was the widow of a Captain in the Royal Navy and who naturally, I suppose, gave hospitality to a stranger from another navy. She invited him to her house, and whilst he was there he saw a pair of binoculars which belonged to her, and he remarked upon them. Shortly afterwards she found that they had disappeared. She taxed him with taking them, and he said that he had taken them to be valued and would let her have them back in a few days. She asked him for them again and again: he said that he would speak to the man who was valuing them, but in fact what had happened was that he had been to see a Mr. Groves, told him

1951.
*June* 4.

RICHARD DUNCAN ARMSTRONG.

Goddard, L.C.J., Lynskey, J., Devlin, J.

they were the binoculars of a friend and sold them to him for, apparently, a sum of £12. In addition to that, Mrs. Hardy found that a pendant watch which she had left attached to a coat of hers in her bedroom had also disappeared, and it is obvious from what was found afterwards that the applicant had taken that as well. At first he denied all knowledge of the watch and said that the binoculars had been sold by him. Later he admitted that he had taken the watch and that he had given it to a lady friend as a Christmas present. That was the evidence of the prosecution of the admissions made by the applicant to the police. His defence was that Mrs. Hardy had given him the binoculars in order to avoid her brother getting possession of them or the value of them, and so far as the watch was concerned, apparently, that he had also taken that with her consent. On the evidence, which was quite clear, the jury came to the conclusion that the applicant was Guilty of both these offences. There was ample evidence upon which they could so find, and in fact, one would have been extremely surprised if they had found to the contrary.

When the applicant applied for bail before the magistrates, his previous convictions were disclosed to them. It is said here that, notwithstanding the evidence, because a report of those previous convictions—and it is suggested an inaccurate report—appeared in the newspapers, therefore this Court must give the applicant leave to appeal against his conviction, with a view to its being quashed. It is quite clear that it is the duty of magistrates when an application is made to them for bail to hear and inquire into the antecedents of the person who is applying for bail, and if they find he is a person with a bad record, particularly if that record is of a person who is likely to commit similar offences whilst out on bail, they must consider in the light of such record whether they should allow him bail. The magistrates in this case acted quite properly and were entitled to act as they in fact did act.

It is said that the decision of this Court in DYSON (1943), 29 Cr. App. R. 104, compels this Court to say that publication in local newspapers of the information given to the magistrates

1951.
*June* 4.

RICHARD DUNCAN ARMSTRONG.

Goddard, L.C.J., Lynskey, J., Devlin, J.

with regard to previous convictions is of itself sufficient to require the quashing of the conviction. That case lays down no such principle. It was a similar type of case in which the Court thought it proper that in the special circumstances of that particular case the appeal ought to be allowed and the conviction quashed. But the Court was not laying down, and we do not propose to lay down, a rule that merely because a newspaper, either local or national, discloses what has happened at the magistrates' Court, although it is very undesirable that such a disclosure should be published, on that and on that ground alone, this Court must quash a conviction of a man who on the evidence is clearly guilty.

The position is that, so far as the publication of that information is concerned, this Court has no power to compel the Press, but this Court agrees that it is undesirable that such information should be given in the Press. But the fact that such information is given is no ground for this Court to infer either that the jurors who tried the case had read it or that, if they had read it, that they were unfit to try the case or biassed against the prisoner for the purpose of the trial.

In our view there is no reason in this case for interfering with the verdict of the jury, and the application will be refused.

*Application refused.*

---

*Solicitors:* Reid, Sharman & Co., for the applicant.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE LYNSKEY AND MR. JUSTICE DEVLIN.

1951.
*June* 11.

## LEONARD EDWARD ERNEST CHRIST.

*Summing-up—Charges of Larceny and Receiving—Conclusion of Evidence and Counsel's Addresses—Case One of Larceny or Nothing—Count for Larceny only to be Left to Jury.*

Where an indictment contains alternative counts for larceny and receiving, though it may be proper that both counts should be opened to the jury, once it has become apparent that the case should be regarded as one of larceny or nothing, only the count for larceny should be left to the jury.

Appeal against conviction.

The appellant was convicted at Hertfordshire Quarter Sessions on May 4, 1951, of receiving stolen lead, and was sentenced by the Chairman to twelve months' imprisonment.

The appellant was indicted jointly with one Barry. The indictment contained alternative counts for larceny and receiving. It was proved that on the night of February 16/17, 1951, a house was broken into and a quantity of lead stolen from it. Further, evidence was given by the police that on the night of the offence the appellant and Barry were seen in a field ninety yards from the house, pulling a parcel towards a tree, and that the parcel was subsequently found to contain the stolen lead. The case throughout was treated as one of larceny or nothing, but the Chairman left both the count for larceny and the count for receiving to the jury. The jury acquitted both Barry and the appellant of larceny, and on the count for receiving disagreed with regard to Barry, but convicted the appellant, who had set up the defence of *alibi*.

1951.
*June* 11.

LEONARD EDWARD ERNEST CHRIST.

Goddard, L.C.J., Lynskey, J., Devlin, J.

*David Fairbairn*, for the appellant:

The verdict was unreasonable, in view of the acquittal of larceny. This must have meant that the jury were dissatisfied with the evidence of the police, and they could not at the same time accept the evidence on the alternative charge.

*Edward Clarke*, for the Crown:

The verdict was certainly a surprising one, but there was some evidence of receiving, in the sense that it was a conceivable view that someone else might have broken into the house and the appellant and Barry received the lead from that person.

DEVLIN, J.: The issue in this appeal is a very short and simple one. The appellant was convicted at Hertfordshire Quarter Sessions on a count charging receiving, and the circumstances which led up to his conviction were these. A house called "Lyndhurst" was unquestionably broken into by someone on the night of the 16th/17th February, and a quantity of lead was stolen from it. The evidence against the appellant and another man, named Henry George Barry, with whom he was indicted but who is not concerned in this appeal, was that on that very same night the two of them were seen (if the police evidence is accepted) in a field only some ninety yards from the house which had been broken into, pulling a parcel across the field to a tree, and when the contents of that parcel were subsequently investigated they were found to be the stolen lead.

The two men were charged on an indictment which contained a count for larceny and also a count for receiving, but it was plain, we think, from the very first that the case against them both was a case of larceny or nothing. That was the way in which, we are told, it was opened by learned counsel for the prosecution, and that was the view which substantially was taken of it in the learned Chairman's summing up to the jury. He said, towards the beginning of his summing up: "It is for you to judge, but I think you may well come to the conclusion, if the evidence given by the police is true in this case, there

1951.
*June* 11.

LEONARD EDWARD ERNEST CHRIST.

Goddard, L.C.J., Lynskey, J., Devlin, J.

can be no doubt that each of these men was one of those concerned in stealing that lead and removing it from 'Lyndhurst' that night". Again, in relation to that, he says: "If they"—that is, the police—"are not mistaken about that, then these two men were caught red-handed in the act".

The count of receiving was, however, left to the jury, and the learned Chairman did devote a passage in his summing up to it; but, having regard to the view which he stated in the summing up as I have shown by the extracts from it, not a very substantial passage. On the charge of larceny the jury acquitted both Barry and the appellant. On the charge of receiving, they disagreed about Barry and convicted the appellant.

The difficulty about that verdict is this. While it may be possible, as Mr. Clarke, for the Crown, has said, that there is technically some evidence of receiving in that it is conceivable that the men might have received the lead from the people who had actually stolen it, it is impossible to believe that the jury, particularly in the light of the summing up, could have acquitted the men of larceny except on the view that they had reasonable doubt about the police evidence. It may be, in the appellant's case, that doubt was assisted by the fact that he called some evidence of an *alibi* to show he was doing something else that night. However that may be, it seems plain to this Court that those two verdicts are quite inconsistent and cannot stand together. It is impossible to believe that the jury could have accepted the evidence of the police, upon which alone they would be justified in convicting him of receiving, and at the same time rejected it, or not accepted it, in the case of larceny.

In the judgment of this Court, therefore, the verdict must be regarded as a perverse one. I use that word in no derogatory sense, but as meaning a verdict at which the jury, if they had correctly appreciated the issues which they had to try, could not reasonably have arrived. Accordingly, in the judgment of this Court, the conviction must be quashed.

We desire, however, to add this. There are, of course, many

1951.
*June* 11.

LEONARD EDWARD ERNEST CHRIST.

Goddard, L.C.J., Lynskey, J., Devlin, J.

cases in which, when a man is found in possession of property or has been seen to be associated with property, it is uncertain whether the evidence for the prosecution will ultimately satisfy the jury that he was guilty of stealing it or of receiving it, and therefore, the indictment, very properly, includes both counts, though they must necessarily be alternative counts. It may well be, even in such a case as the present case, that it is desirable that the two counts should be opened to the jury, because it is conceivable that the defence may take such a turn, or may raise such other facts as would make the count of receiving one which it would be desirable for the jury to consider: but once it becomes apparent, as at the conclusion of the evidence and of counsel's addresses plainly it did in this case, that the case is one of larceny or nothing, then it is, in our opinion, desirable that the trial Judge, in his summing up, should put simply to the jury the count of larceny, and leave out altogether from their consideration the alternative count of receiving. Had that been done in this case, there would have been no possibility of any confusion. It would, we think, much simplify matters for the consideration of a jury in this type of case if, as soon as it becomes apparent what is the real charge on which, if they are going to convict at all, they must convict, that charge alone is left to the jury.

*Conviction quashed.*

---

*Solicitors*: Solicitor for Metropolitan Police, for the Crown.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE LYNSKEY, AND MR. JUSTICE DEVLIN.

---

1951.
*June* 4, 13.

## SUMATAPALAGE REGINALD GUNEWARDENE

*Evidence—Witness Called to Discredit Opposite Party's Witness—Extent of Right to Examine—Evidence of Mental State of Witness to be Discredited—Admissibility.*

*Joint Trial—Statement by Prisoner Implicating Co-Prisoner—Summing-up—Duty of Judge—Duty of Counsel for Prosecution in Reading Statement.*

The credit of any witness may be impeached by the opposite party by the calling of a witness who swears that he, from his knowledge of the first-named witness, believes him to be unworthy of credit on oath. The impeaching witness may not, on examination-in-chief, give reasons for his belief, but he may be asked for his reasons in cross-examination, and his answers in cross-examination cannot be contradicted.

Where, therefore, a witness for the prosecution had stated that the prisoner had attempted to bribe a co-prisoner to withdraw a statement which she had made and which implicated the prisoner, and defending counsel had desired to call a medical witness to prove that the witness for the prosecution was suffering from a particular mental state, and that the effect of that state would be to render his evidence unworthy of credit, but the Judge at the trial had refused to admit the evidence of the medical witness,

*Held*, that the evidence had been rightly excluded under the above rule.

WATSON (1817), 2 Stark. N. P. 116, and BROWN AND HEDLEY (1867), L. R. 1 C. C. R. 70, followed.

Where a prisoner has made a statement implicating a co-prisoner who is tried jointly with him, it is the duty of the Judge to impress on the jury that the statement is not evidence against the co-prisoner and must be entirely disregarded for that purpose; but counsel for the prosecution, in putting in the statement, is not under any duty to select certain passages and leave out others.

1951.
*June* 4, 13.

SUMATAPALAGE REGINALD GUNEWARDENE.

Goddard, L.C.J., Lynskey, J., Devlin, J.

Appeal against conviction.

The appellant was convicted at the Central Criminal Court on March 16, 1951, of manslaughter and was sentenced by Hilbery, J., to three years' imprisonment.

The appellant, who was a medical man, was tried together with a woman named Mrs. Hanson, the allegation of the prosecution being that a pregnant woman had died as the result of an operation for the purpose of procuring a miscarriage having been performed on her by Mrs. Hanson, and that the appellant was an accessory before the fact.

At the trial a man named Davies, who was the brother of Mrs. Hanson, was called by the prosecution to prove that the appellant had attempted to bribe Mrs. Hanson to withdraw a statement which she had made to the police and which incriminated the appellant. His evidence was denied by the appellant, and defending counsel then desired to call a doctor to prove that Davies was suffering from a particular mental state, the effect of which would be to render him unworthy of credit on oath. Hilbery, J., ruled that the evidence was inadmissible, and the doctor was not called.

The whole of Mrs. Hanson's statement was put in evidence at the trial by the prosecution, but Hilbery, J., in his summing-up, warned the jury not to regard it as evidence against the appellant.

The further facts are set out in the judgment.

*D. N. Pritt, K.C.* (*D. L. Gunewardene* and *Eric Myers* with him) for the appellant:

There are two substantial grounds of appeal. In the first place, it was wrong that the whole of Mrs. Hanson's statement should have been read to the jury. The portions which implicated the appellant should have been excluded. It must be conceded that the Judge did in his summing-up warn the jury not to regard the statement as evidence against the appellant, but it was extremely difficult for the jury in a case of this kind to put the statement wholly out of their minds when considering the appellant's case and the appellant must have been gravely

1951.
*June* 4, 13.

SUMATAPALAGE REGINALD GUNEWARDENE.

Goddard, L.C.J., Lynskey, J., Devlin, J.

prejudiced. Secondly, the Judge was wrong in excluding the evidence of the medical witness whom the defence desired to call to discredit Davies. Some confusion appears to have arisen in the early cases between evidence of general reputation, where the prisoner's character is in issue, and knowledge of the general credit of a witness called by the opposing side, but the two are in reality quite different matters. The limits of the former were clearly defined in ROWTON (1865), L. & C. 520. Some ambiguity as to the limits of the latter appears in some of the early cases, but the later cases, in particular, WATSON (1817), 2 Stark N. P. 116, and BROWN AND HEDLEY (1867), L. R. 1 C. C. R. 70, have made it clear that the witness called to discredit an opposing witness is entitled to give individual knowledge of the opposing witness's general lack of credit. BROWN AND HEDLEY (*supra*) appears to have been the latest case where the rule was discussed, with the exception of the civil case of STEBBINGS *v.* LONDON & N. W. RY. CO. (1899), 63 J. P. 138, where the same principle was followed. [He referred also to SHARP *v.* SCOGING (1817), Holt 541; RUDGE (1805), Peake's Add. Cas. 232; MAWSON *v.* HARTSINK (1802), 4 Esp. 102; and DAVISON (1808), 31 St. Tr. 99, at p. 190.] In every textbook the rules with regard to evidence as to the prisoner's character and evidence called to discredit an opposing witness are dealt with separately. [He referred to *Stephen's Digest of the Law of Evidence*, 12th ed., art. 146, and *Russell on Crimes*, 8th ed., Vol. II, p. 2174.] Under the established rule on this matter, it is conceded that some of the questions which defending counsel desired to put to the medical witness could not have been put in examination-in-chief, but the witness could have given evidence which would have been relevant and admissible, and the Judge should not have excluded it.

*Christmas Humphreys*, for the Crown:

The putting in evidence of Mrs. Hanson's statement followed the usual recognised practice, and Hilbery, J., was particularly careful in his summing-up to warn the jury not to regard that

1951.
*June* 4, 13.

SUMATAPALAGE REGINALD GUNEWARDENE.

Goddard, L.C.J., Lynskey, J., Devlin, J.

statement as evidence against the appellant. On the authorities, the Judge was clearly right in excluding the evidence of the medical witness. The principle is conveniently summarised in *Cockle's Law of Evidence*, 7th ed., p. 314: "Evidence to discredit a witness is admissible to prove . . . that he has such a general bad character for veracity that he is not entitled to be believed on his oath". In addition to the authorities referred to by counsel for the appellant, the matter has received consideration in ROOKWOOD (1696), 13 St. Tr. 139; LAYER (1722), 16 St. Tr. 193; ATT.-GEN. *v.* HITCHCOCK (1847), 11 Jur. 478; BISPHAM (1830), 4 C. & P. 392; JONES (1809), 31 St. Tr. 251, at p. 310; and CLARKE *v.* PERIAM (1742), 2 Atk. Rep. 337, at p. 339. There appears to be no modern criminal case since BROWN AND HEDLEY (*supra*) in which it has been considered. It is clear that only "general" evidence can be given by the discrediting witness in examination-in-chief; but "general" may mean that the evidence must be limited to the witness's knowledge of the other witness's general reputation, or it may mean that the witness is entitled to give general evidence of his own knowledge. It is submitted that the first of these two interpretations is the proper one.

*D. N. Pritt, K.C.*, in reply:

To adopt the first of the two interpretations of the word "general" as exclusive would run counter to the weight of current authority.

THE LORD CHIEF JUSTICE: The appellant was convicted at the Central Criminal Court, together with Alice Louisa Hanson, who does not appeal, of the manslaughter of a girl named Grace MacLean, and was sentenced to three years' imprisonment. At the end of the argument the Court dismissed his appeal against conviction and intimated they would give their reasons later. On reflection the Court desired fuller consideration of the cases bearing on the admissibility of certain evidence, so the order was not drawn up, and a further argument has now been addressed to the Court.

1951.
*June* 4, 13.

SUMATA-PALAGE REGINALD GUNE-WARDENE.

Goddard, L.C.J., Lynskey, J., Devlin, J.

In outline the case for the prosecution was that the dead girl came from Scotland, when she was pregnant, to stay with a Mrs. McKissack, who was a panel patient of and known to the appellant. On November 13 she went to the prisoner Hanson's house and the latter admitted that she performed an operation on her for the purpose of procuring an abortion, and did procure it by means of a syringe, though this, of course, was not evidence against the appellant. The result of the operation was that a wound was caused in the uterus by the syringe and this became septic, with the result that the girl died of general septicæmia. So far as Mrs. Hanson was concerned, the only question was whether death was the result of the abortion, which, we have said, she admitted having performed. So far as the appellant was concerned, the case for the Crown was that he was an accessory before the fact and therefore a principal in the second degree.

The case made was that he drove the girl, who had visited his surgery, to Mrs. Hanson's house in order that the operation might be performed upon her, and that after the operation he drove her back to Mrs. McKissack's house. The girl was accompanied by a woman referred to as Ann, who went with her into Mrs. McKissack's house, and the appellant followed them a few minutes afterwards. He does not appear to have given any advice or directions that evening, but Mrs. McKissack put the girl to bed and the doctor then left with Ann. The next morning the doctor telephoned to Mrs. McKissack and told her to give the girl a warm bath. He visited her in the afternoon and told Mrs. McKissack to call him back if she wanted him. The girl seemed to get ill during the day and, as a result of telephone messages, the doctor called between 10 and 11 at night and was in the bedroom for some little time. He left and came back about an hour later and stayed till about 1 o'clock in the morning, when he left, saying that he had given her a drug so that she would sleep. In the early morning following the girl was in obvious pain and Mrs. McKissack again telephoned to the appellant. By this time it was clear that the girl was very seriously ill

1951.
*June* 4, 13.

SUMATA-PALAGE REGINALD GUNE-WARDENE.

Goddard, L.C.J., Lynskey, J., Devlin, J.

and, according to Dr. Teare's evidence, must so have been when the appellant was there at 1 a.m., when she should have been sent to hospital. It was not till about 7 o'clock in the morning that the appellant caused her to be taken to hospital, sending a note with her to say that she had had an incomplete miscarriage and retained placenta. In fact, at this time the girl was *in extremis* and was dead by the time the ambulance reached the hospital.

The police evidence was that at their first interview with the appellant he made a written statement describing how he had been, as he said, called by Mrs. McKissack to the girl just after midnight on November 14/15, and that during that interview and from what he saw the girl had a miscarriage that had appeared to be a normal miscarriage, and he treated her and gave some advice to Mrs. McKissack, but was sent for the next morning. He came to the conclusion that it was a case of a retained placenta and that she should go to hospital, where he sent her with the note we have already mentioned. At a subsequent interview, when the police told him that they had ascertained that he had driven the girl to Mrs. Hanson's, he admitted it by saying: " On that night I was only fulfilling an obligation by taking them there. I got nothing out of it and certainly did not hand Mrs. Hanson any money ". This last observation was because the police told him that it was alleged that McLean had paid his secretary £50, of which he had handed £20 to Hanson. He also admitted that he had taken the girl and Ann in his car from Mrs. Hanson's back to Mrs. McKissack's flat.

The defence was a complete denial of the case made by the prosecution, except so far as he admitted attending the girl at Mrs. McKissack's flat, having been sent for by the latter on account of the girl's condition. He denied that he had ever told the police that he had driven the girl to or from Hanson's house, and he called evidence which, had it been believed, was to the effect that he was elsewhere at the time when he was supposed to have been on these journeys. In other words, his real defence was one of *alibi* at the all

1951.
*June* 4, 13.

SUMATAPALAGE REGINALD GUNEWARDENE.

Goddard, L.C.J., Lynskey, J., Devlin, J.

important times. It was not contended that there was no evidence on which a jury could convict, but the two contentions which formed the main argument for the appellant were, first, that the Judge wrongly refused to admit the evidence of a doctor with a view to discrediting a witness named Davies, who had given highly prejudicial evidence against the appellant, and, secondly, that the whole of Mrs. Hanson's statement, which not only admitted her part in the crime but also set out in detail the appellant's part in it, ought not to have been read so far as concerns those parts which affected the appellant. Some points were taken as to misdirection which, Mr. Pritt frankly admitted, were only minor points, and it is sufficient to say with regard to them that the Court is of opinion that not only was there no misdirection, but that the learned Judge's summing-up was fair and adequate and not open to criticism in any respect.

Dealing now with the first of the main questions argued, the man Davies, who was the brother of Mrs. Hanson, was called to prove that the appellant had bribed, or attempted to bribe, Mrs. Hanson to withdraw the statement she had made to the police and to say that she had made it in a moment of panic and that it was untrue. There is no doubt that the evidence of this witness was highly prejudicial to the appellant. He was severely and properly cross-examined with a view to showing that he was not a witness of truth, and he admitted that he had lied on many occasions. His evidence was wholly denied by the appellant, and after the appellant's evidence his counsel desired to call a doctor to give evidence, as he put it, as to Davies's reliability as a witness. On counsel for the Crown objecting to this evidence, Mr. Marshall, for the appellant, said: "My Lord, I submit it is admissible on the ground of general reputation for truthfulness and honesty". He had previously told the learned Judge that he intended calling this doctor to give some evidence about the condition of Davies's mind. When Hilbery, J., said that the evidence would not be that of general reputation, Mr. Marshall said: "My Lord, with respect, reputation. I drop the word 'general'"; and

1951.
*June* 4, 13.

SUMATA-PALAGE REGINALD GUNE-WARDENE.

Goddard, L.C.J., Lynskey, J., Devlin, J.

later he said: "I am going to call the doctor to prove whether or not he is suffering from a particular mental state. I propose to ask what that mental state is, what the effect of it is, and, my Lord, the question of whether his evidence is to be rejected thereafter is a matter of inference for the jury". The learned Judge held that this evidence would be inadmissible, and accordingly the witness was not called.

The question raised is of some importance as to the extent to which evidence may be given to discredit witnesses called by the opposing party. That witnesses can be called to say that they would not believe a particular witness called by the other side, whether for the prosecution in a criminal case or for a party in a civil case, is, we think, undoubted, but the nature of the discrediting evidence and how far the witness can go in stating the grounds for his belief are the matters which we have to determine. It does not seem open to doubt that the true rule with regard to the character of a prisoner is that a witness must speak of the prisoner's general reputation and not of particular facts known to the witness on which he bases his opinion. If, for instance, a witness says that he knows nothing of the general character of the prisoner but that he has had abundant opportunity of forming an individual opinion as to his honesty, such evidence is inadmissible. That was expressly decided in ROWTON (1865), L. & C. 520; 34 L. J. M. C. 57, though the Court there did hold that it is open to a witness to say: "I have never heard anything against the character of the person of whose character I have come to speak", because the fact that a prisoner's character has never come into issue or discussion may be the most cogent evidence that his reputation is good. The case principally relied on by Mr. Pritt was BROWN AND HEDLEY (1867), L. R. 1 C. C. R. 70, where counsel for the defendants proposed to call witnesses to prove that they would not believe the witnesses for the prosecution on their oaths. Counsel for the prisoner cited MAWSON *v.* HARTSINK (1802), 4 Esp. 102, and was then stopped by the Court. Counsel for the Crown submitted that to allow such a question would be contrary to ROWTON'S CASE (*supra*), but

1951.
*June* 4, 13.

SUMATAPALAGE REGINALD GUNEWARDENE.

Goddard, L.C.J., Lynskey, J., Devlin, J.

the report states: "The Court, however, declined to hear any further argument on the subject, observing that all the text-writers were agreed that the evidence could be given, and that the practice was so ancient, and hitherto so undoubted, that it could not be altered now unless by the authority of the legislature". That case, therefore, appears to be a direct authority that a witness called to impeach the credibility of previous witnesses can express an individual opinion and is not confined to giving evidence of the latter's general reputation. It is to be observed that in ROWTON'S CASE (*supra*), as reported 34 L. J. M. C. at p. 59, counsel is reported as arguing: "There is no distinction in principle between evidence as to the character of a witness and of a prisoner", to which observation the Chief Justice replied: "The cases are essentially different. In the case of the character of a witness as to his credibility on oath, the individual opinion of another is what is sought. In such case the witness could not say the general opinion is that the man ought not to be believed on his oath. But in case of a prisoner what is the general opinion of his character is what is to be proved".

We asked for re-argument in this case with a view to examining other and earlier authorities on the matter and to see if the witness called is confined to stating his individual opinion or whether he may go into any reasons which led him to form that opinion. We need not deal with all the cases to which our attention has been called by counsel on either side, though the Court is indebted to them for their full and careful survey of the authorities. The first case to which we think it necessary to refer is DE LA MOTTE (1781), 21 St. Tr. 687, a trial for high treason at which Buller, J., presided. In his charge to the jury, at p. 811 of the report, the learned Judge said: "There are the three witnesses called to impeach the credit of Lutterloh. The witness Lappel said he rather doubted whether he would trust or believe him. The counsel for the defendant did not put the question in the manner the question always is, and ought to be put, if they mean to impeach the veracity of a witness; and every day's experience

teaches the gentlemen at the Bar how they ought to put the question, if they think the answer will serve their purpose; for the question was never asked of any witness, whether he thought this man, from his general character, deserved to be believed upon his oath. The only question at all like that was put to Lappel, with this addition, whether he would trust or believe him". It would therefore seem that the learned Judge's opinion was that a witness called to impeach testimony was confined to giving evidence as to general reputation and could not state his individual opinion. But later cases show that the rule has at any rate been relaxed, though Lord Ellenborough seems to have taken much the same view in MAWSON *v.* HARTSINK (1802), 4 Esp. at p. 103, where, after some discussion, he allowed the question to be put in this way: "Have you the means of knowing what the general character of this witness was? and from such knowledge of his general character, would you believe him on his oath?". That case was decided in 1802, and two years afterwards, in CARLOS *v.* BROOK (1804), 10 Ves. 49, Lord Eldon said that a witness may be asked whether he would believe a man on his oath, but it is not competent to ask him the ground of his opinion. This question was again much discussed in WATSON (1817), 2 Stark. N. P. 116, at p. 149. The main question seems to have been whether, for the purpose of discrediting a witness, it could be asked if he had been convicted of an offence without producing a record of the conviction. That question can no longer arise as the matter is dealt with by section 6 of the Criminal Justice Act, 1865, usually referred to as Denman's Act. But the judgments in WATSON'S CASE (*supra*) clearly show that all the Judges were of opinion that, while a witness can be called to say that he would not believe a previous witness on his oath, he cannot in chief give evidence of particular facts as justifying his opinion. There is certainly nothing inconsistent with this view in BROWN'S CASE (*supra*), and in our opinion the effect of the cases is correctly stated in art. 146 of the 12th edition of *Stephen's Digest of the Law of Evidence*: "The credit of any witness may be impeached by the opposite party, by the

1951.
*June* 4, 13.

SUMATA-PALAGE REGINALD GUNE-WARDENE.

Goddard, L.C.J., Lynskey, J., Devlin, J.

evidence of persons who swear that they, from their knowledge of the witness, believe him to be unworthy of credit upon his oath. Such persons may not, upon their examination-in-chief, give reasons for their belief, but they may be asked their reasons in cross-examination, and their answers cannot be contradicted ". The reason for this rule, or rather, for the limitation which is imposed upon the evidence that the witness can give, is obvious. Were it otherwise, an issue would at once arise as to whether the facts upon which the witness stated he based his opinion were true or otherwise. The issue before the Court in a criminal trial is simply whether or not the prisoner has committed the offence with which he is charged. The Court cannot at the same time have to try the question whether or not certain facts spoken to with regard to a witness were true or not, nor would there be any means of obtaining the opinion of the jury upon that question.

Now, in the present case, had Mr. Marshall called Dr. Leigh, the most that he could have asked him in chief was: " From your knowledge of the witness Davies would you believe him on his oath? ". But this was not what Mr. Marshall desired to do. He was perfectly frank with the learned Judge and told him that he wished to call Dr. Leigh to say that he, as a medical man, had examined the witness and had come to the conclusion that the man was suffering from a disease of the mind and that therefore he regarded his testimony as unreliable. In our opinion, that is exactly what the cases show cannot be done. He can state his individual opinion, but not the facts upon which it is founded, and this case is a good illustration for the reason of the limitation placed upon this class of evidence to which we have already referred. In common fairness to the witness, if that evidence were given, he might have wished evidence called to prove that he was not suffering from any disease of the mind, and the case against the prisoner ought not to be complicated by a simultaneous but subsidiary trial as to the sanity or insanity of a particular witness. Perhaps this case does illustrate the desirability of adhering strictly to the rule that a ruling should not

be given upon the admissibility or otherwise of evidence until the particular question is asked, but, bearing in mind the avowed reason which counsel gave for desiring to call the witness, we do not, in this particular case, wish to be thought to be making any unfavourable comment on the course adopted. It is abundantly clear that if the witness had been called the only object in calling him would have been to have evidence by a medical man as to the result of an examination he had made of a witness and the opinion he had formed thereon, which, as we have already said, was inadmissible. In our opinion, both on principle and authority, such evidence was inadmissible.

We now turn to the second of the main questions argued on behalf of the appellant. As we have said, there is no doubt that the statement made by the prisoner Hanson incriminated the appellant in a high degree. This is a matter of very frequent occurrence where two or more prisoners are charged with complicity in the same offence. This state of affairs is, no doubt, a ground upon which the Judge can be asked to exercise his discretion and order a separate trial, but no such application was made in the present case. If no separate trial is ordered, it is the duty of the Judge to impress on the jury that the statement of the one prisoner not made on oath in the course of the trial is not evidence against the other and must be entirely disregarded, and that warning was emphatically given by Hilbery, J., in the present case. But it would be impossible to lay down that, where two prisoners are being tried together, counsel for the prosecution is bound, in putting in the statement of one prisoner, to select certain passages and leave out others. The woman prisoner having pleaded Not Guilty, he was bound to prove the case against her, and so far as she was concerned the evidence mainly consisted in the statement she had made. The learned Judge not only warned the jury that they must not regard her statement as evidence against the appellant but was at pains not to read, in his summing-up, the whole of the statement which she made, confining himself to those parts which bore on her guilt and not on that of the

1951.
*June* 4, 13.

SUMATA-PALAGE REGINALD GUNE-WARDENE.

Goddard, L.C.J., Lynskey, J., Devlin, J.

appellant, though he did read one passage which implicated the appellant, again warning the jury that it was not evidence against him. He went so far as to advise the jury not to ask for the woman's statement when they retired, so that they should not have before them matter prejudicial to the appellant.

If we were to lay down that the statement of one co-prisoner could never be read in full because it might implicate, or did implicate, the other, it is obvious that very difficult and inconvenient situations might arise. It not infrequently happens that a prisoner, in making a statement, though admitting his or her guilt up to a certain extent, puts greater blame upon the co-prisoner, or is asserting that certain of his or her actions were really innocent and it was the conduct of the co-prisoner that gave them a sinister appearance or led to the belief that the prisoner making the statement was implicated in the crime. In such a case that prisoner would have a right to have the whole statement read and could, with good reason, complain if the prosecution picked out certain passages and left out others. The statement was clearly admissible against Hanson and was read against her, and although in many cases counsel do refrain from reading passages which implicate another prisoner and have no real bearing on the case against the prisoner making the statement, we cannot say that anything has been admitted in this case which was not admissible, and the learned Judge gave adequate and emphatic directions to the jury on the subject.

For these reasons we have come to the conclusion, on both grounds, that the appeal fails and must be dismissed, but in the circumstances the sentence will date from conviction.

*Appeal dismissed.*

---

*Solicitors* : Darracotts, for the appellant.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HILBERY AND MR. JUSTICE ORMEROD.

---

## CLIFFORD PERCY HOMER.

1951.
*July* 15.

*Corrective Training—Supervision Order made* per incuriam—*Practice of Court—Criminal Justice Act*, 1948 (11 & 12 *Geo.* 6, *c.* 58), *s.* 22, *Sched. III.*

Where *per incuriam* a supervision order under section 22 of the Criminal Justice Act, 1948, has been made on the passing of a sentence of corrective training, leave to appeal against the order will not be given; the order will merely be treated as surplusage and removed.

Appeal against sentence and application for leave to appeal against conviction.

The appellant was convicted on January 16, 1951, at Southend Quarter Sessions of receiving stolen property and was sentenced by the Recorder to four years' corrective training and to a supervision order under section 22 of the Criminal Justice Act, 1948.

The appellant in person.

THE LORD CHIEF JUSTICE: The appellant was given leave to appeal against sentence by Gorman, J., because of a mistake that had been made in making an order under section 22 of the Criminal Justice Act, 1948, when a sentence of corrective training was passed. It was hardly necessary to give leave to appeal against sentence in those circumstances in order to put the matter right. The sentence of corrective training was a proper sentence to pass, and we need only say that the order under section 22 will be expunged, because Schedule III to the Act provides in cases of persons sentenced to corrective training what is to happen when they are discharged.

1951.
*July* 16.

CLIFFORD PERCY HOMER.

Goddard, L.C.J., Hilbery, J., Ormerod, J.

[His Lordship then stated that, in the opinion of the Court, there was no ground for giving leave to appeal against conviction.]

Once or twice Quarter Sessions have made the mistake of making an order under section 22 when passing a sentence of corrective training, but the effect of it is simply a nullity. Schedule III to the Act provides exactly how a person is to report when he is released from corrective training. There is no need, therefore, to give leave to appeal if *per incuriam* an order is made under section 22; it will just be treated as surplusage and removed on the order of a single Judge.

*Order accordingly.*

---

[DIVISIONAL COURT CASE]

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HILBERY AND MR. JUSTICE ORMEROD.

---

1951.
*July* 24.

## WALTERS *v.* LUNT AND ANOTHER.

*Child under Eight—Receiving Stolen Property—Larceny—Property Wrongfully Acquired by Child—Property Handed by Child to Another Person—Liability of such Person—Larceny Act*, 1916 (6 & 7 *Geo.* 5, *c.* 50), *ss.* 1, 2, 33 (1) (3)—*Children and Young Persons Act*, 1933 (23 *Geo.* 5, *c.* 12), *s.* 50.

By section 50 of the Children and Young Persons Act, 1933: "It shall be conclusively presumed that no child under the age of eight years can be guilty of any offence".

Where a person, with guilty knowledge, has received from a child under eight years of age property wrongfully acquired by such child, such person cannot be convicted of receiving stolen property, since, by reason of the child's incapacity to commit crime, the property is not "property . . . stolen or obtained . . . under circumstances which amount to felony or misdemeanour" within the meaning of section 33 (1) of the Larceny

Act, 1916. Such person may, however, if he has the requisite guilty intent, be guilty of larceny as a bailee or larceny by finding in respect of such property.

CREAMER, 14 Cr. App. R. 19; [1919] 1 K. B. 564 applied.

Case stated by Lincoln city justices.

At a Court of summary jurisdiction at Lincoln an information was preferred by Charles Hubert Walters, Chief Constable of Lincoln (" the appellant "), under section 33 of the Larceny Act, 1916, charging Geoffrey Lunt and Florence Maud Lunt (" the respondents ") with, between August 1 and August 31, 1950, jointly feloniously receiving from Richard Norman Lunt, their son, aged seven years, a child's tricycle of the value of £2, which had theretofore been feloniously stolen, knowing the same to have been so stolen. A further information charged the respondents with jointly feloniously receiving from the same child, on March 11, 1951, a child's fairy cycle of the value of £4, the property of Olive Dalton.

The following facts were proved or admitted:

In August, 1950, a child's tricycle of the value of £2, the property of Walter Cole, was put away by him in his outhouse, and no one had any right or authority to take it away. On March 11, 1951, a child's fairy cycle of the value of £4, the property of Olive Dalton, was seen by her in her coalhouse and no one had any right or authority to take it away. On March 12, 1951, a police officer found both the tricycle and the fairy cycle at the respondents' home, the identity of the tricycle having been changed by the application of a different sort of paint. The female respondent's explanation for the possession of the tricycle was that her son had brought it home to see if she would buy it, and with regard to the fairy cycle she accepted her son's story that it had been given him by a woman who lived on or near Burton Road, Lincoln. The male respondent's explanation was that he had seen his son playing with the tricycle, but did not know that it was stolen, and with regard to the fairy cycle he said that he understood a lady had given it to the boy. No active steps had been taken by either

1951.
*July* 24.

WALTERS
*v.*
LUNT AND
ANOTHER.

Goddard,
L.C.J.,
Hilbery, J.,
Ormerod, J.

of the respondents to ascertain where the cycles came from or to whom they belonged. Police enquiries to trace a woman living in the vicinity indicated by the respondents as having given the boy the fairy cycle had proved unsuccessful.

On the part of the appellant it was contended that, although section 50 of the Children and Young Persons Act, 1933, prescribes " that no child under the age of eight years can be guilty of any offence ", it does not say that a child under such age is not capable of committing an offence, and that, though he was not to be convicted as a principal, the receivers of property stolen by such a child were none the less liable to be convicted; also that the provisions of section 33 (3) of the Larceny Act, 1916, applied and that the receivers were liable to be convicted even though the child (as the principal offender) was not amenable to justice.

On the part of the respondents it was contended that neither of them had any knowledge that the property was stolen.

The justices were of opinion that a child under the age of eight years could not in law commit a crime, that the goods acquired by the child were not goods stolen or obtained under circumstances amounting to a felony or misdemeanour, and that section 33 (3) of the Larceny Act, 1916, did not apply; and that the respondents could not be convicted of receiving the goods. They accordingly dismissed the informations.

The prosecutor appealed.

*T. R. Fitzwalter Butler*, for the appellant. Although section 50 of the Children and Young Persons Act, 1933, says that no child under the age of eight years " can be guilty of any offence " and not " can be capable of committing any offence ", it would be difficult, in view of the plain language of the section, to contend that property wrongfully acquired by a child under eight years can be stolen property. The difficulty is enhanced by the decision of this Court in CREAMER, 14 Cr. App. R. 19; [1919] 1 K. B. 564, a case where a wife had wrongfully taken her husband's property while they were living

1951.
*July* 24.

WALTERS
*v.*
LUNT AND
ANOTHER.

Goddard,
L.C.J.,
Hilbery, J.,
Ormerod, J.

together. The material words to be construed in that case, which are to be found in the proviso to section 36 of the Larceny Act, 1916: "Provided always that no criminal proceedings shall be taken by any [spouse] against [his spouse] by virtue of this Act while they are living together", were far more favourable to the prosecution than the words of section 50 of the Act of 1933, and yet the Court interpreted those words as meaning that no larceny of the property could be committed by a spouse while living with her spouse. The true view of this case would appear to be that the respondents, assuming guilty intent to have been established, were guilty of larceny by finding, and probably larceny as bailees also. The position is really no different from the case of a person appropriating a ring which he knows has been brought to him from the owner's house by a jackdaw.

The respondents did not appear.

THE LORD CHIEF JUSTICE: This is a Case Stated by justices for the City of Lincoln, before whom the respondents, a husband and wife, were charged that "between the 1st and 31st days of August, 1950, they jointly feloniously did receive from Richard Norman Lunt (aged seven years) a child's tricycle of the value of £2, the property of Walter Cole, which had theretofore been feloniously stolen, knowing the same to have been stolen"; and there was a similar charge in respect of a child's fairy cycle alleged to have been received by them on the 11th March, 1951, from Richard Norman Lunt, aged seven years, and we infer from the Case that Richard Norman Lunt is the child of the respondents. The justices refused to convict on the ground that, as the child was under eight years of age, he was incapable of stealing, and could not be convicted of the felonious act of larceny, and therefore the parents could not be guilty of receiving stolen goods, because they received them from a person who was incapable of stealing.

In my judgment the justices were quite right in the decision to which they came. It was a very novel point for them and I think they came to a perfectly right decision. The authority

1951.
*July* 24.

WALTERS
*v.*
LUNT AND
ANOTHER

Goddard,
L.C.J.,
Hilbery, J.,
Ormerod, J.

that really makes the matter clear is CREAMER, 14 Cr. App. R. 19; [1919] 1 K. B. 564. The facts in that case were different, because the parties involved there were husband and wife, but a man who had received property from the wife was held not to have been rightly convicted of receiving because evidence had not been given of the facts necessary to prove the wife guilty of larceny from the husband. A married woman living with her husband can steal from her husband only if she steals from him when leaving or deserting, or when she is about to leave or desert him; therefore, unless it was proved that she took the property when she was leaving or about to leave her husband, she could not have stolen the property, although she might have taken it.

So here the child could not be guilty of larceny because he is under eight. Unless he is eight years old, he is not considered in law capable of forming the intention necessary to support a charge of larceny. Therefore the justices came to a perfectly proper decision in this case on the charge of receiving and we so inform them. We answer the question which they submit to us, which is whether they came to a correct determination and decision in point of law, by saying that they did. But this will not prevent the prosecution from preferring a further charge against the respondents for larceny, because the facts show that it would be open to the justices to convict them, in my opinion, either of larceny as bailees or larceny by finding. Larceny is defined in section 1 of the Larceny Act, 1916. Under that section " a person steals who, without the consent of the owner, fraudulently and without a claim of right made in good faith, takes and carries away anything capable of being stolen with intent, at the time of taking, permanently to deprive the owner thereof: Provided that a person may be guilty of stealing any such thing notwithstanding that he has lawful possession thereof, if being a bailee or part owner thereof, he fraudulently converts the same to his own use or the use of any person other than the owner ". Then: " (2) The expression ' takes ' includes obtaining the

possession . . . by finding where at the time of the finding the finder believes that the owner can be discovered by taking reasonable steps ". Here the child brought the goods home and the parents took possession of those goods and kept them. It can be submitted to the justices that they put themselves in the position of bailees of the true owner, and the doing of the acts found in this case, coupled with the telling of the untruths which they told, would be a ground on which the justices could find that they converted the goods to their own use. Alternatively, the justices could decide that it was a case of larceny by finding, the parents finding these articles in their house, brought there by the child. If the justices were to come to the conclusion that at the time when the child brought them home the respondents believed the owner could be discovered by taking reasonable steps—and I should not think they would have much difficulty in finding that—they would be guilty of larceny by finding.

Therefore we dismiss this appeal, and it will be for the police to decide whether they will prefer a further charge before the justices, and should they do so, the decision of the justices on the charge of receiving will be no bar to a conviction if they find the facts establishing larceny proved.

HILBERY, J.: I am of the same opinion.

ORMEROD, J.: I agree.

*Appeal dismissed.*

---

*Solicitors*: Sharpe, Pritchard & Co., for J. H. Smith, Town Clerk, Lincoln, for the appellant.

[DIVISIONAL COURT CASE]

BEFORE

THE LORD CHIEF JUSTICE AND MR. JUSTICE ORMEROD.

1951.
*July* 25.

## SHIMMELL *v.* FISHER AND OTHERS

*Road Traffic—Taking and Driving Away Motor Vehicle without Owner's Consent—"Driving"—Vehicle Caused to Move from Position by Pushing—Road Traffic Act*, 1930 (20 & 21 *Geo.* 5, *c.* 43), *s.* 28.

A person who causes a motor vehicle to move from its place by pushing it without the consent of the owner or other lawful authority may be guilty of an offence under section 28 of the Road Traffic Act, 1930.

Case stated by Stockport justices.

At a Court of summary jurisdiction at Stockport, an information was preferred by the appellant, Lawrence Shimmell, a police officer, charging the respondents, Kendrick Fisher and two other youths, with taking and driving away a motor vehicle without the consent of the owner or other lawful authority, contrary to section 28 of the Road Traffic Act, 1930. It was established that a motor lorry was standing on the recreation ground at Stockport, and two of the respondents sat in the cab and one held the driving wheel. One of them took off the brake and gave the vehicle a push and it ran a few yards downhill. The respondents then tried to start it, but the engine did not function and the vehicle did not move under its own power. The justices were of opinion that, having regard to the limited motion of the lorry and the limited degree of control exercised over it, the respondents were not guilty of the offence and dismissed the information.

The prosecutor appealed.

1951.
*July* 25.

SHIMMELL
*v.*
FISHER AND
OTHERS.

Goddard,
L.C.J.,
Ormerod, J.

*H. A. P. Fisher*, for the appellant.
The respondents did not appear.

THE LORD CHIEF JUSTICE: This is a case stated by justices for the County Borough of Stockport at the instance of the police, who prosecuted three boys under section 28 of the Road Traffic Act, 1930, for taking and driving away a motor vehicle. Apparently the motor vehicle was standing on the recreation ground at Stockport and the three respondents got round it. Two of them sat in the cab and one of them held the driving wheel. They then took off the brake, gave the vehicle a push and it went a few yards because there was a depression. Then it stopped and they did apparently try to start it, but the engine did not fire properly and so it did not move under its own power. When a policeman came up, they ran away.

The point that is involved in this case is: What is the true meaning of the words "take and drive away" in section 28 of the Road Traffic Act, 1930? The justices said that they were not prepared to give the same construction to the words "take and drive away" as is given to the words "take and carry away" in section 1 of the Larceny Act, 1916. They thought that, having regard to the limited motion of the lorry and the limited degree of control exercised over it, they could not find that the respondents had taken and driven away the vehicle.

In my opinion, the justices were wrong for this reason: I think "driving away" must be construed as causing the vehicle to move, and a vehicle can be driven by pushing for this purpose, if it is made to move from the place where it was standing. There is a proviso to the section: If the Court or jury "are satisfied that the accused acted in the reasonable belief that he had lawful authority, or in the reasonable belief that the owner would, in the circumstances of the case, have given his consent, if he had been asked therefor, the accused shall not be liable to be convicted of the offence". That shows, at any rate, that the statute is not meant to deal with the case where a person is moving a vehicle simply for his convenience, because it is blocking his doorway or is not in a

1951. *July* 25.

SHIMMELL *v.* FISHER AND OTHERS.

Goddard, L.C.J., Ormerod, J.

suitable position in the car-park to allow cars to get out; and, in my opinion, the very fact that the Legislature has inserted that proviso shows that any other form of moving the car is an offence. Therefore I think that the justices came to a wrong construction and that they must find that the respondents did commit the offence.

ORMEROD, J.: I agree, and for the same reasons.

---

*Solicitors*: Gregory Rowcliffe & Co., agents for J. H. W. Glen, Stockport, for the appellant.

---

[DIVISIONAL COURT CASE]

BEFORE

THE LORD CHIEF JUSTICE AND MR. JUSTICE ORMEROD.

---

1951. *July* 25.

## STEWART *v.* CHAPMAN.

*Road Traffic—Notice of Intended Prosecution—Notice Sent by Post—Time for Posting—Computation of Time—Day of Offence to be Excluded—Road Traffic Act*, 1930 (20 & 21 *Geo.* 5, *c.* 43), *s.* 21 (*c*).

Where a notice of intended prosecution under section 21 of the Road Traffic Act, 1930, is sent by post, it must be posted in sufficient time to enable it, in the ordinary course of post, to reach the person to whom it is addressed within fourteen days of the commission of the offence. In calculating the fourteen days, the day of the commission of the offence is to be excluded.

GOLDSMITHS' CO. *v.* WEST METROPOLITAN RY., [1904] 1 K. B. 1, followed.

1951.
*July* 25.

STEWART
*v.*
CHAPMAN.

Goddard,
L.C.J.,
Ormerod, J.

Case stated by Middlesex justices.

At a Court of summary jurisdiction an information was preferred by Ronald Stewart, a police officer ("the appellant") charging Peter John Chapman ("the respondent") with driving a motor vehicle without due care and attention, contrary to section 12 of the Road Traffic Act, 1930. When the case was opened, a preliminary point was taken on behalf of the respondent that notice of intended prosecution had not been given within fourteen days of the commission of the offence, as required by section 21 (*c*) of the Road Traffic Act, 1930. The prosecution and the justices accepted the following statement of facts by the respondent. The alleged offence was committed at 7.15 a.m. on January 11, 1951. Notice of intended prosecution was dispatched by the appellant to the respondent by registered post at 1 p.m. on January 24, and was delivered to the respondent at about 8 a.m. on January 25. The justices held that notice of intended prosecution had not been given within due time and dismissed the information.

The prosecutor appealed.

*Vernon Gattie*, for the appellant.

*J. L. Elson Rees*, for the respondent.

THE LORD CHIEF JUSTICE: This is a Case Stated by justices for the county of Middlesex, before whom the respondent was charged with driving without due care and attention, contrary to section 12 of the Road Traffic Act, 1930.

When the case was opened, a preliminary point was taken on behalf of the respondent that notice of the intended proceedings had not been given within fourteen days of the commission of the offence. No evidence was called on either side about that; apparently the facts were accepted. It is just as well that I should once more remind justices that in these cases the onus is on the defendant if he wishes to set up this point, but I think there can be no doubt in this case that the prosecution accepted the statement of facts which was given by or on behalf of the respondent. On those facts the

1951.
*July* 25.

STEWART
*v.*
CHAPMAN.

Goddard,
L.C.J.,
Ormerod, J.

justices held that the notice had not been given within due time and therefore gave effect to the preliminary point and dismissed the information.

The facts on which they acted were these: that "the alleged offence was committed at 7.15 a.m. on the 11th January, 1951, the notice of intended prosecution was not dispatched by the appellant to the respondent by registered post until 1 p.m. on the 24th January, 1951, and was not delivered to the respondent until the 25th January, 1951, at about 8 a.m.".

It is argued that, as the notice was not delivered to the respondent until January 25 at 8 a.m., more than fourteen days had elapsed and therefore the notice was out of time. One point which Mr. Gattie has put forward, namely, that whether or not January 25 was the fourteenth day, the notice was given in time because it had been posted on the previous day, is, in my opinion, wrong. The words of section 21 (*c*) of the Road Traffic Act, 1930, are: "within the said fourteen days a notice of the intended prosecution specifying the nature of the alleged offence and the time and place where it is alleged to have been committed was served on or sent by registered post to him or the person registered as the owner of the vehicle at the time of the commission of the offence". I think it is not enough to post the notice within the fourteen days; it must be posted within such time as in the ordinary course of post will enable it to reach the person to whom it is addressed within the statutory time. It is, to my mind, perfectly clear that it is not intended that there should be any longer time allowed to the prosecution if they post the document than if they serve the document. Further than that, it seems to me that section 26 of the Interpretation Act, 1889, puts the matter beyond all doubt. That section provides: "Where an Act passed after the commencement of this Act authorises or requires any document to be served by post, whether the expression 'serve', or the expression 'give' or 'send', or any other expression is used, then, unless the

contrary intention appears, the service shall be deemed to be effected by properly addressing, prepaying, and posting a letter containing the document, and unless the contrary is proved to have been effected at the time at which the letter would be delivered in the ordinary course of post".

Therefore in these cases it is just as well that the prosecutors, that is to say, in most cases the police, should understand that if the notice is to be served by post it must be posted at such a time that in the ordinary course of post it will reach the defendant before the expiration of the fourteen days.

The real point, however, in this case, is whether, in calculating the fourteen days, the date of the commission of the offence is to be included, and on that subject we have had a considerable number of cases cited.

In my opinion, there is no doubt how that matter has to be decided at the present time. In the eighteenth century, when Courts were given very much to making fine distinctions, a distinction seems to have been drawn, to use the language of the Master of the Rolls, Sir Richard Henn Collins, in THE GOLDSMITHS' COMPANY *v.* WEST METROPOLITAN RY., [1904] 1 K. B. 1 (at p. 4), "between a term created within which an act may be done and a time limited for the doing of an act".

Mr. Rees, whose industry has caused him to look up several of the old cases, has very properly called our attention to two cases decided, no doubt, by Judges of high authority, BELLASIS *v.* HESTER (1697), 1 Raymond's Rep. 280, and also ADDERLEY (1780), 2 Douglas's Reports 463, in which Lord Mansfield gave the judgment of the Court. Those cases did draw the distinction to which I have just referred, but in my opinion those cases must now be taken to be overruled. They have been consistently disregarded ever since the rule, if there was one, was broken into by Sir William Grant, the Master of the Rolls, in LESTER *v.* GARLAND (1808), 15 Ves. 248. This was the first case in which the question really arose whether there was to be a fixed rule on this subject or not. Hitherto there no doubt had been a general rule laid down, but the Master of

1951.
*July* 25.

STEWART
*v.*
CHAPMAN.

Goddard,
L.C.J.,
Ormerod, J.

the Rolls, in LESTER *v.* GARLAND (*supra*), departed from that rule, or at any rate said he was not going to follow that general rule in the future. He referred especially to ADDERLEY (*supra*), and then he said, before referring to that rule: "It is said for the plaintiffs, that upon this subject a general rule has been by decision established; that, where the time is to run from the doing of an act (and for the purpose of this question it must extend to the happening of an event) the day is always to be included. Whatever dicta there may be to that effect, it is clear, the actual decisions cannot be brought under any such general rule". He then reviewed many of the decisions, and went on: "It is not necessary to lay down any general rule upon this subject: but upon technical reasoning I rather think it would be more easy to maintain that the day of an act done, or an event happening, ought in all cases to be excluded, than that it should in all cases be included". That was the first case in which the rule, if there was one, was definitely broken into, at any rate by a statement that the Courts would not follow it in all cases.

I turn next to YOUNG *v.* HIGGON (1840), 6 M. & W. 49. In that case there is a judgment of Baron Parke in which the other members of the Court, Baron Alderson, Baron Gurney and Baron Rolfe, concurred, and they refused to be bound by such rule. Having referred to ADDERLEY (*supra*), and to an earlier case, CASTLE *v.* BURDITT (1790), 3 T. R. 623, Baron Parke said (at p. 52): "But since those decisions, the subject has been much considered in the case of LESTER *v.* GARLAND (*supra*), which introduced a new view of the question. I do not say that that case is precisely in point with the present: but looking at the elaborate judgment of the Master of the Rolls, in which all the authorities are collected and commented upon, I should feel little difficulty in saying that the day in this case ought to be reckoned exclusively, on the authority of that case alone". Then he reviewed many of the other cases, and went on: "In WEBB *v.* FAIRMANER (1838), 3 M. & W. 473, in which almost all the authorities are cited, this Court held,

1951.
*July* 25.

STEWART
*v.*
CHAPMAN.

Goddard,
L.C.J.,
Ormerod, J.

in conformity with the decisions just referred to, that where a party bought goods to be paid for in two calendar months, the day of the sale should be reckoned exclusively in computing the time. That case has been followed up by the decisions of the Court of Queen's Bench in the two cases of SHROPSHIRE JUSTICES (1838), 8 Ad. & E. 173, and BLUNT *v.* HESLOP (1838), 8 Ad. & E. 577; so that the point may now be considered as settled by a course of recent decisions, all proceeding upon the same principle, that the day from which the computation is made ought, in cases like the present, to be excluded; and such appears to me to be the reason and good sense of the matter".

That case was again considered in RUSSELL *v.* LEDSAM (1845), 14 M. & W. 574. There the learned Baron said (at p. 582): "The usual course in recent times has been to construe the day exclusively, whenever anything was to be done in a certain time after a given event or date".

Those cases were all before the Court of Appeal, or considered by the Court of Appeal, in GOLDSMITHS' COMPANY *v.* WEST METROPOLITAN RY. (*supra*) in 1903; and it was in that case that the Master of the Rolls stated the two conflicting views which had been taken, according to whether a term was created which commenced with the first day of the term, as in the case of a lease, and a time limited from a fixed date for the doing of an act. He held that it was now well established, whatever the expression used, that the day of the doing of the act was to be excluded. Mathew, L.J., put it very succinctly and shortly in his judgment; he said (at p. 5): "The true principle that governs this case is that indicated in the report of LESTER *v.* GARLAND (*supra*), where Sir William Grant broke away from the line of cases supporting the view that there was a general rule that in cases where time is to run from the doing of an act or the happening of an event the first day is always to be included in the computation of the time. The view expressed by Sir William Grant was repeated by Baron Parke

1951. *July* 25.

STEWART *v.* CHAPMAN.

Goddard, L.C.J., Ormerod, J.

in RUSSELL *v.* LEDSAM (*supra*), and by other Judges in subsequent cases. The rule is now well established that where a particular time is given, from a certain date, within which an act is to be done, the day of the date is to be excluded ".

That case, which is binding on this Court, seems to me to entirely apply to the words of this section: " Within the said fourteen days "—that is, fourteen days of the commission of the offence—" a notice of the intended prosecution specifying the nature of the alleged offence and the time and place where it is alleged to have been committed was served on or sent by registered post ". This letter was received on the morning of January 25. It follows, in my opinion, that the notice was served in time, and accordingly this appeal must be allowed. The case must go back to the justices with an intimation that the notice was served in time and a direction to them to continue the hearing of the case.

ORMEROD, J., I agree and have nothing to add.

*Appeal allowed.*

---

*Solicitors*: Solicitor for Metropolitan Police, for the appellant; Ponsford & Devenish, for the respondent.

---

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HILBERY, MR. JUSTICE BYRNE, MR. JUSTICE FINNEMORE AND MR. JUSTICE ORMEROD.

---

1951. *July* 30.

## EDWARD MICHAEL HARRISON-OWEN.

*Evidence—Character of Prisoner—Cross-Examination on Previous Convictions—Nature of Defence—Involuntary and Unintentional Act—Burglary—Prisoner found in House—Criminal Evidence Act*, 1898 (61 & 62 *Vict. c.* 36), *s.* 1.

1951.
*July* 30.

EDWARD MICHAEL HARRISON-OWEN.

Goddard, L.C.J., Hilbery, J., Byrne, J., Finnemore, J., Ormerod, J.

Where the defence of the prisoner is that an act proved against him, *e.g.*, his presence in a house alleged to have been burgled by him was an involuntary and unintentional act, the prosecution are not entitled to cross-examine him on his previous convictions.

Appeal against conviction (on certificate).

The appellant was convicted at Flint Assizes on May 26, 1951, of burglary and was sentenced by Stable, J., to two years' corrective training.

The appellant was found upstairs in the house alleged to have been burgled at 1 a.m., having obtained the key of the house from a bag left by the owner in a motor-car outside the house. At the trial he put forward the defence that his entry into the house was not a voluntary act and that he had walked into it in a state of automatism. The Judge expressed some uncertainty as to the nature of the defence, but eventually ruled that, the defence being that the appellant's presence in the house was accidental, the prosecution were entitled to put the whole of his previous history to him and he was accordingly cross-examined on his previous convictions, which were numerous. The Judge gave a certificate under section 3 (*b*) of the Criminal Appeal Act, 1907, on the question whether he had rightly permitted questions to be put to the appellant in cross-examination with regard to his previous convictions.

*Edmund Davies*, K.C., and *Philip Owen*, for the appellant. The Judge was wrong in permitting the cross-examination. It was permissible under section 1 of the Criminal Evidence Act, 1898, only if the previous convictions of the appellant were relevant to show that the appellant was guilty of the offence of which he was then charged. Evidence of this kind has been admitted to rebut a defence of accident: MAKIN *v.* ATT.-GEN. FOR NEW SOUTH WALES, [1894] A. C. 57; THOMPSON *v.* DIRECTOR OF PUBLIC PROSECUTIONS, 13 Cr. App. R. 81, [1918] A. C. 221, but it was pointed out by Lord Sumner in the latter case, at pp. 78 and 232 of the respective reports, that there must be an unmistakable defence of accident, and

1951.
*July* 30.

EDWARD MICHAEL HARRISON-OWEN.

Goddard, L.C.J., Hilbery, J., Byrne, J., Finnemore, J., Ormerod, J.

that the prosecution " cannot credit the accused with fancy defences in order to rebut them at the outset with some damning piece of evidence ". Here the defence was not that of accident, but of an involuntary act arising from a state of automatism, and there is no authority for the proposition that in the case of a defence of that kind such cross-examination is admissible to rebut it. If the cross-examination was wrongly admitted, the Court should not apply the proviso to section 4 (1) of the Criminal Appeal Act, 1907, however strong the rest of the evidence may have been: TURNER, 30 Cr. App. R. 9; [1944] K. B. 463.

*Gerald Howard, K.C.*, and *John Gazdar*, for the Crown. It is difficult to say precisely what the defence of the appellant was, and the Judge evidently for some time felt difficulty in this matter, but the defence may fairly be expressed by saying that the appellant was contending that his entry into the house was not felonious, but accidental, and evidence of previous felonious entries into houses giving rise to convictions of burglary or housebreaking would in that case be relevant and admissible under the authorities already cited. It is certainly unusual for the Court to apply the proviso in a case where irregular cross-examination with regard to previous convictions has been admitted, but in this case the rest of the evidence was overwhelming.

THE LORD CHIEF JUSTICE: The appellant was convicted before Stable, J., at the last assizes for the county of Flint of burglary, that is to say, breaking into a house by night with intent to commit a felony. The learned Judge gave a certificate of appeal on the question whether he had rightly permitted questions to be put to the appellant in cross-examination with regard to his previous convictions.

The appellant is a man of very bad character, with a list of convictions against him for larceny and housebreaking and the like, and it is quite obvious that once those convictions were before the jury he would have no chance of acquittal. The

1951.
*July* 30.

EDWARD MICHAEL HARRISON v. OWEN.

Goddard, L.C.J., Hilbery, J., Byrne, J., Finnemore, J., Ormerod, J.

curious thing in this case is that the learned Judge ever thought it necessary, in view of the appellant's defence, that those other convictions should be put, because the defence was a defence seldom put before a jury. The only reason why a special Court of five Judges instead of three was called was that when the case came before us in the first instance last week we thought that the ruling, if it were right, brought about such a remarkable state of affairs that we had better have a full Court to consider it. Now, when we have had the assistance of Mr. Davies and Mr. Howard, both of whom have assisted the Court as far as possible, the case seems to be one of great simplicity.

The appellant was found in a house, where a party was in progress, at one o'clock in the morning or thereabouts. The mistress of the house, on going upstairs to turn out the lights, found him there. How had he got in? She happened to have left her car outside the house while her friends were there, and unfortunately left her bag in the car. The appellant had come along and possessed himself of the bag and had then found, within the bag, the keys, one of which was the latch key of the house, and so let himself in. When he was found in the house, he told some cock-and-bull story about looking for lodgings. He was brought downstairs and, while one of the guests was fetching the police, he bolted. He was not, I imagine, in a state of automatism then. It is a remarkable fact that he provided himself with the keys of the house by opening the car door and so went in. He did not seem at all able to make up his mind whether he was going to say that he was drunk or had a blackout at the time, and when he proceeded to give evidence at the trial the learned Judge was a little puzzled whether he was not setting up a plea of insanity. It seems that the questions that were asked went, first of all, to the issue whether he was sane or not, then to the issue whether he was drunk or not and finally to the issue whether he was in a state of automatism or not. When a prisoner sets up those kinds of defence, it is just as well to leave the matter

1951.
*July* 30.

EDWARD MICHAEL HARRISON-OWEN.

Goddard, L.C.J., Hilbery, J., Byrne, J., Finnemore, J., Ormerod, J.

to the jury, who will probably reject them all; but, in view of the defences set up, the learned Judge directed counsel for the prosecution, who was by no means anxious to do it, to cross-examine the appellant on his previous history. The learned Judge put it in this way: "I direct here that in view of this defence that has been raised—that there is no intention in the act from start to finish, and that his presence in the house was purely accidental—you can put the whole of this man's history to him". There is confusion, if I may say so with all respect to the learned Judge, there. He is confusing intention and accident. If certain facts have happened, and the defence is that those were due to accident—and the matter has generally arisen in cases of murder or manslaughter, in which a person is said to have been in association with the prisoner and to have died by accident—it has often been held that it is relevant to show that other people who had been in association with the prisoner have died in precisely the same circumstances. One of the well-known cases is the case of the woman who was found dead in a bath: SMITH (1915), 11 Cr. App. R. 229. It was said she had accidentally drowned herself through having a heart attack or something of that sort in the bath, and it was shown, when the husband was being tried for the murder of his second wife, that his first and third wives had died in exactly the same circumstances. Of course, that was to negative the defence that the death of the second wife was accidental.

In this case, as has been pointed out in the course of the argument by my brother Byrne, the real defence here was that this was not a voluntary act, and that the appellant walked into the house in a state of automatism, and whether it was a voluntary act or not was a question for the jury. If it was a voluntary act, the jury would then have to consider whether or not the appellant went in with the intention of stealing, and I should not think they would have had any difficulty in coming to a conclusion on that matter. Also, on the question

1951.
*July* 30.

EDWARD MICHAEL HARRISON-OWEN.

Goddard, L.C.J., Hilbery, J., Byrne, J., Finnemore, J., Ormerod, J.

whether it was an involuntary act, I should have thought the jury would have had no difficulty in coming to a conclusion. The defence really was a pack of absurdities, but unfortunately the learned Judge took the view that on the authorities the appellant was entitled to be cross-examined on his previous convictions to show that his act was not a voluntary act. This Court cannot find any authority for that, and the results that would follow would certainly be very startling.

In our opinion, now that this case is properly understood, there is no question of principle in it at all, except that where the defence is that the act which has been proved against the prisoner, in this case his presence in the house, was not a voluntary but an unintentional act, it is not permissible to cross-examine him as to his previous convictions. As that was done, this Court feels it cannot apply the proviso and therefore this conviction must be quashed.

*Conviction quashed.*

---

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HILBERY AND MR. JUSTICE ORMEROD.

---

## CHARLES LURIE.

1951.
*July* 30.

*False Pretences—Indictment—Property Obtained for Another Person—No Allegation to that Effect—Conviction Quashed—Larceny Act*, 1916 (6 & 7 *Geo.* 5, *c.* 50), *s.* 32 (1).

*Transcript—Discretion of Court—When other than "Short Transcript" will be Allowed—Criminal Appeal Act*, 1907 (7 *Edw.* 7, *c.* 23), *s.* 16.

The appellant was convicted on several counts of an indictment charging him with obtaining property by false pretences, the particulars of offence in each case alleging that he

1951.
*July* 30.

CHARLES LURIE.

Goddard, L.C.J., Hilbery, J., Ormerod, J.

had obtained a cheque from N. The evidence showed that in each case the cheque had been made payable by N. not to the appellant, but to a limited company and had been paid by that company into its banking account.

*Held*, that to "obtain" in section 32 (1) of the Larceny Act, 1916, means to obtain the property in and not merely the possession of the goods alleged to have been obtained, and that as the appellant did not obtain any of the cheques for himself, the counts charging him with obtaining by false pretences were wrong in form and the convictions on these counts must be quashed.

SMITH AND OTHERS, 34 Cr. App. R. 168; [1951] 1 K. B. 53 considered.

Where anything beyond a "short transcript", *i.e.*, a transcript setting out the arraignment, plea, summing-up and evidence after conviction is required, the only transcript to be allowed without the leave of the Court is a transcript of any particular piece of evidence referred to in the notice of appeal, which may be allowed by the Registrar, if in his opinion such a transcript is necessary. Otherwise, no fuller transcript, unless the single Judge has allowed such a transcript, is to be allowed except on application made to the Court, when the Court will require to be satisfied that a fuller transcript is really necessary.

Appeal against conviction and sentence.

The appellant was convicted at the Central Criminal Court on February 22, 1951, of conspiracy to defraud and also on four counts charging him with obtaining property by false pretences, and was sentenced by the Commissioner to eighteen months' imprisonment for the conspiracy and, consecutive to that, to a further sentence of eighteen months' imprisonment on each of the counts charging false pretences, the sentences in respect of those counts being concurrent.

In each of the counts alleging false pretences, the appellant was charged with obtaining a cheque, in the majority of cases from Leslie Collier Nicholls. The evidence showed that in every case the cheque had been made payable by the drawer to a limited company and had been paid by that company into its banking account.

1951.
*July* 30.

CHARLES LURIE.

Goddard, L.C.J., Hilbery, J., Ormerod, J.

*C. N. Shawcross, K.C.*, and *B. S. Wingate-Saul* for the appellant. The convictions on the counts alleging false pretences were bad, inasmuch as the count in each case charged the appellant with obtaining the cheque, whereas the evidence showed that in no case did he obtain it. The cheque was in every case made payable by the drawer to a limited company, and paid by that company into its banking account. The appellant should have been charged with causing or procuring the cheque to be paid to the company, under the other limb of section 32 (1) of the Larceny Act, 1916. [He referred to SMITH AND OTHERS, 34 Cr. App. R. 168; [1951] 1 K. B. 53.] [He also complained of various matters of alleged misdirection.]

*J. M. G. Griffith-Jones* for the Crown. No doubt it would have been proper to lay the counts charging false pretences in the manner suggested by counsel for the appellant, but the irregularity should not be treated as one of substance.

THE LORD CHIEF JUSTICE: The appellant was convicted before the Commissioner, Sir Ernest Goodman Roberts, at the Central Criminal Court on a count charging him with conspiring with two other persons, who were convicted along with him and do not appeal, " to cheat and defraud such persons as might be induced to part with moneys and goods to the Donella (Wine) Company, Ltd., by false pretences ". He was also charged in certain counts with obtaining cheques by false pretences. He was acquitted on one and convicted on four of those counts, and the counts on which he was convicted were, except for the particulars, in identical terms: " Obtaining property by false pretences contrary to section 32 (1) of the Larceny Act, 1916 ". The Particulars of Offence in count 6 were that the three defendants on March 3 " with intent to defraud obtained from Leslie Collier Nicholls a cheque for £2,500 by falsely pretending that the Donella (Wine) Company, Ltd., was then a financially sound and prosperous

1951.
*July* 30.

CHARLES LURIE.

Goddard, L.C.J., Hilbery, J., Ormerod, J.

business and that the Royal Automobile Club was a customer of the said company and that £2,500 was then required for the purchase by the said company of whisky and that they, the said Marks, Murray and Lurie, then intended to apply the proceeds of the said cheque substantially for that purpose ".

Count 8 charged the three defendants in the same way under the same section, and the Particulars related to the obtaining of another cheque from Mr. Nicholls, a cheque for £4,000 " by falsely pretending that the Donella (Wine) Company, Ltd., was then a financially sound and prosperous business and that substantially the whole of £2,500 advanced to the said company by the said Leslie Collier Nicholls on the 3rd day of March, 1949, had been applied to the purchase of whisky and that £3,000 was then required for the payment of duty on whisky and that they, the said Marks, Murray and Lurie, then intended to apply £3,000 of the proceeds of the said cheque for that purpose ".

Another count on which the appellant was convicted was count 14. That was another count with regard to Mr. Nicholls, and related to a further cheque for £4,300 with substantially the same representations as in the last count to which I have referred. Count 16 charged the three defendants that, with intent to defraud, they " obtained from C. A. Rookes & Company, Ltd., a cheque for £1,000 by falsely pretending that the Donella (Wine) Company, Ltd., was then in a position to supply whisky to the value of £1,000 and that an offer by the said Donella (Wine) Company, Ltd., to sell whisky to the said C. A. Rookes & Company, Ltd., was an honest and bona fide offer ".

The circumstances, so far as the false pretences go, show that the appellant did make representations which the jury must have found by their verdict were false, and false to his knowledge; but the cheques which were obtained were cheques which were made out by the drawer to the order of the company and therefore the drawer meant that the cheques should

become the property of the company and that the company should be the person to receive the money from his bank on the cheques.

Section 32 (1) of the Larceny Act, 1916, under which the defendants were charged, provides as follows: " Every person who by any false pretence (1) with intent to defraud, obtains from any other person any chattel, money, or valuable security, or causes or procures any money to be paid, or any chattel or valuable security to be delivered to himself or to any other person for the use or benefit or on account of himself or any other person . . . shall be guilty of a misdemeanour ".

The objection which has been taken by Mr. Shawcross with regard to the convictions for false pretences is that, whereas the indictment alleges that the appellant obtained the cheques, he did not obtain the cheques; it was the company that obtained the cheques, and he should have been charged not with obtaining the cheques himself but obtaining the cheques for the use of the company. It is a technical point and a point which, in one sense, has no merits, but it is a good point. One has only to consider the recent case of BALL, 35 Cr. App. R. 24; [1951] W. N. 130, which was before this Court only on February 19, 1951, and had not been reported at the time when the learned Commissioner summed up in this case; and also the case of SMITH AND OTHERS, 34 Cr. App. R. 168; [1951] 1 K. B. 53. In both cases it is clear that the Court said that " obtained " means obtained the property and not merely the possession; and if the cheque was made out, as it was in this case, to the limited company, the defendants may have been guilty of making false pretences with intent to defraud, but they did not do it with the intent of obtaining the cheques themselves, because they were obtaining them for the company, and therefore the indictment technically was wrong. It seems that this point must have been overlooked; as it was overlooked in the case of SMITH AND OTHERS (*supra*), which

1951.
*July* 30.

CHARLES LURIE.

Goddard, L.C.J., Hilbery, J., Ormerod, J.

was a very long and heavy trial at Winchester Assizes, where prominent counsel were instructed. I see that there is a note in the Criminal Appeal Reports that the indictment in that case had been settled by counsel, and it is a matter which I commend to the attention of counsel that, where the person who makes the false pretence obtains the property for somebody else, the indictment must allege that and not allege that he obtained it for himself.

In this case, the cheques having been made out to the company, there is no doubt that the company was the owner of those cheques; it was always intended to be the owner. The only banking account into which those cheques could have gone was the banking account of the company. If a director, for instance, had endorsed the cheques and paid them into his own account, he would have been guilty of a fraud on the company; and, as is well known since UNDERWOOD (A.L.), LTD. *v.* BANK OF LIVERPOOL, [1924] 1 K. B. 775, no bank will now allow a cheque made out to a limited company to be paid into any account except that of the limited company.

For these reasons, in the opinion of the Court, the convictions on the four counts of obtaining cheques by false pretences must be quashed, because the evidence did not support them, and as the convictions are quashed, with them must go the sentence which was passed on those counts.

I should say in fairness to the learned Commissioner that this point with regard to all that the defendants obtained being the possession of and not the property in the cheques was not taken in the way in which it has been taken before us today. It certainly was not pressed home in the way in which Mr. Shawcross has put it to us today. I do not think that the learned Commissioner was made aware of the real point, and certainly no authority was cited as it has been today.

With regard to the rest of the case, that is to say, with regard to the conspiracy, the Court is of opinion that the

1951.
*July* 30.

CHARLES LURIE.

Goddard, L.C.J., Hilbery, J., Ormerod, J.

learned Commissioner summed up this case, which had taken twelve days, with great care and perfectly fairly. He did not, of course, take every point that was made by the defence; no Judge could do it unless he was going to take another twelve days in summing up the case. We have said over and over again that what is required is that the case for the prosecution and the case for the defence should be fairly stated and the proper direction in law should be given by the presiding Judge, and that he is not bound to put every point. In our opinion there is no fault to be found with the summing up and the conviction on the conspiracy must stand. We quash the conviction on the counts charging false pretences.

The learned Commissioner passed a sentence of eighteen months' imprisonment for conspiracy and a consecutive sentence of eighteen months' imprisonment for false pretences. The effect of our decision is that the conviction on conspiracy only is upheld and the total sentence therefore is halved, that is to say, the sentence of eighteen months for conspiracy stands and the sentence of eighteen months which was passed on the other counts does not stand.

The Court is bound to call attention to one other matter. An application was made to the Registrar for a transcript of the shorthand note. So far as this Court is concerned, all we have been referred to is the summing-up. We have not referred to the evidence, but we recognise that if we had not given the decision we have done it might have been necessary to consider some of the evidence. But this is an instance of the enormous expense to which the country can be put by a request for a full transcript of a trial that took some twelve days in all. The appellant had to pay for his copy of the transcript, which is a very different matter. I am told that the cost of transcribing all this evidence is £217.

The consequence is that this Court will give this direction: that where anything in addition to what is known in this Court as a " short transcript ", that is to say, the charges, the

1951.
*July* 30.

CHARLES LURIE.

Goddard, L.C.J., Hilbery, J., Ormerod, J.

pleas, the summing-up and the evidence after verdict, is asked for, the only transcript of evidence that is to be given without leave of the Court is a transcript of any particular piece of evidence that is referred to in the notice of appeal if, in the opinion of the Registrar, it is necessary. For instance, if an appeal is brought on the ground that the evidence of a particular person is inadmissible or that a piece of cross-examination of the prisoner is inadmissible, then the Registrar can order that a transcript of that piece of evidence should be allowed; but so far as other matters are concerned, unless the single Judge has allowed a transcript, full transcripts are not to be allowed except on an application made to the Court, when the Court will require to be satisfied that it is really necessary, because the country ought not to be put to the enormous expense of full transcripts. We have saved, by the directions we have given, a great deal of transcribing, because in most cases now only a short transcript is allowed, and if appellants want more than the short transcript they will have to apply to the Court. What I have said does not apply in capital cases, because in these cases the full transcript has to be made for the information of the Secretary of State as well as for this Court.

*Conviction quashed in part.*

---

*Solicitors*: Franks, Charlesly & Leighton, for the appellant.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HILBERY AND MR. JUSTICE ORMEROD.

---

## HENRY JOHN BRYAN.

1951. *July* 31.

*Sentence—Conspiracy to Break and Enter Houses and Steal—Ten Years' Imprisonment Affirmed.*

Sentence of ten years' imprisonment in an extremely grave case of conspiracy to break and enter houses and steal affirmed.

MORRIS, 34 Cr. App. R. 210; [1951] 1 K. B. 394 referred to.

Application for leave to appeal against conviction and sentence.

The applicant was convicted at Hampshire Assizes on April 24, 1951, after a trial lasting eleven days, of conspiring to break and enter houses and to steal and was sentenced by Byrne, J., to ten years' imprisonment and ordered to pay £2,000 towards the costs of the prosecution.

A summary of the facts appears in the judgment.

*H. V. Lloyd-Jones, K.C.*, and *M. Levene*, for the applicant.

No counsel appeared for the Crown.

THE LORD CHIEF JUSTICE: This is an application for leave to appeal against conviction and sentence, the applicant having been convicted before Byrne, J., at the Winter Assizes for Hampshire of a conspiracy of a most serious and shocking description. It appeared in the course of the case that the charge against the applicant and the gang with whom he was connected, all of whom were indicted with him and most of whom were found guilty, was that they got into their toils a

1951.
*July* 31.

HENRY JOHN BRYAN.

Goddard, L.C.J., Hilbery, J., Ormerod, J.

man of the name of Allen who was employed by a very well-known firm of safe makers. He knew the combinations of the different safes and the keys which could be made to open those safes. The evidence was that for a very long time there had been a remarkable series of thefts from safes, the safes being opened by false duplicate keys. That is a particularly dangerous and insidious form of crime because it threw—and it was known that it had thrown—suspicion on perfectly innocent people who had possession of the ordinary and proper keys which their employers had entrusted to them; and naturally when an employer finds that a safe has been unlocked and money extracted from it, the first person of whom he thinks as being a potential criminal is the person in possession of the key. This case depended in substance upon the evidence of detective officers of the police of high rank in Scotland Yard, some of whom for years had been engaged in trying to clear up the mystery of how these safes were being opened—safes at Post Offices, banks, business houses and the like. At last it was found that Allen had been making duplicate keys.

[His Lordship referred to the evidence in detail and continued.]

The case against the applicant was in fact an overwhelming one: there was the strongest possible evidence, and it would have been most remarkable if the jury had returned any other verdict than they did. The application for leave to appeal against conviction is refused.

The applicant was found guilty of a conspiracy of the most serious description. There was until quite recently an idea very prevalent in the profession that a longer sentence than two years could not be passed for a common law conspiracy. That has now been declared not to be the law and never to have been the law. I tried to explain the reason why it had become accepted as the law in the recent case of MORRIS, 34 Cr. App. R. 210; [1951] 1 K. B. 394. In that case I said that Hallett, J., had performed a public service by calling attention

1951.
*July* 31.

HENRY JOHN BRYAN.

Goddard, L.C.J., Hilbery, J., Ormerod, J.

to the fact, when he was passing sentence at Sussex Assizes on a man who had been engaged in a conspiracy of a serious kind —a conspiracy to smuggle—that for common law misdemeanours imprisonment at discretion, as it used to be called in the old days, had always been a lawful sentence. The reason why two years' imprisonment had become almost as of course the maximum in conspiracy cases was because it was never considered right, at any rate since the Penal Servitude Act, 1891, was passed, to pass a sentence of imprisonment for longer than two years and penal servitude could not be imposed for common law misdemeanours. All that is put an end to now: there is now no difference between penal servitude and imprisonment, but it is not because of the change in the law regarding the nature of imprisonment which was provided for by the Criminal Justice Act, 1948, that a longer sentence than two years' imprisonment can be passed for a common law misdemeanour. It is because of the principle laid down in the *locus classicus* on the point, CASTRO (1879), 5 Q. B. 490; *affirmed on appeal* (1883), 6 App. Cas. 229. That was a case when the Court was asked to deal on error with the sentence that was passed upon the Tichborne claimant; he had had a variety of names, being variously named according to the various pieces of litigation with which he was concerned, but he was indicted and convicted at the Central Criminal Court in the name of Castro. In that case it was laid down that the sentence could be at discretion in cases of conspiracy, perjury and other offences for which no particular sentence was imposed by statute.

The learned Judge in this case passed a sentence of ten years' imprisonment. Having regard to the very serious nature of this case, how can the Court possibly say that a sentence of ten years is not right? The learned Judge evidently took the view, whether from his own finding or from the evidence of the police officer who gave the antecedents, that

1951.
*July* 31.

HENRY JOHN BRYAN.

Goddard, L.C.J., Hilbery, J., Ormerod, J.

the applicant was the ring-leader. The learned Judge had listened to the case for eleven days and was in a far better position than we are to say whether he was the ring-leader or not, but whether it be the fact or not, we are not concerned with the sentences passed on the other prisoners. In the view of this Court, for a case of this gravity and wickedness, a sentence of ten years' imprisonment errs in no sense either in principle or severity. Certainly it cannot be said to be too severe a sentence. The result is that this application for leave to appeal against both conviction and sentence is refused.

I should add that the applicant, who was said to be a fairly successful bookmaker, was also ordered to pay £2,000 towards the costs of the prosecution. The costs of the prosecution would be considerably over £2,000, I think, considering the length of this case and all the enquiries which had to be undertaken. The Court sees no reason to interfere with that.

*Application refused.*

---

*Solicitors*: James Brodie & Co. & Sons, for the applicant.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HILBERY AND MR. JUSTICE PILCHER.

## JOHN STOBBART.

1951. *Oct.* 2.

*Sentence—Corrective Training—Two Previous Convictions—Offender Placed on Probation on one Occasion—Conviction to be Disregarded—Criminal Justice Act*, 1948 (11 & 12 *Geo.* 6, *c.* 58), *ss.* 7, 12 (1), 21 (1).

A conviction which has resulted in the offender being placed on probation under section 3 of the Criminal Justice Act, 1948, cannot be regarded as one of the two convictions which, under section 21 (1) of that Act, are necessary to enable a sentence of corrective training to be passed.

Appeal against sentence.

The appellant was convicted at Lancashire Assizes on May 25, 1951, of shopbreaking with intent to steal and was sentenced by Oliver, J., to three years' corrective training.

The appellant had been twice previously convicted, in March, 1950, at Workington Magistrates' Court of larceny, when he was fined, and in January, 1951 at Cumberland Quarter Sessions of shopbreaking and larceny, where he was, under section 7 of the Criminal Justice Act, 1948, put on probation for two years. Oliver, J., treated those two convictions as the two convictions which, under section 21 (1) of the Criminal Justice Act, 1948, are necessary to qualify an offender for corrective training.

*H. Hague*, for the appellant:

By reason of the provisions of section 12 (1) of the Criminal Justice Act, 1948, the second conviction, which resulted in the appellant being placed on probation, was to be disregarded except for the purpose of the original proceedings at Cumberland Quarter Sessions and any subsequent proceedings arising

1951.
*Oct.* 2.

JOHN STOBBART.

Goddard, L.C.J., Hilbery, J., Pilcher, J.

out of them, as, for example, proceedings in which the appellant was again brought before the Court for a breach of his undertaking. The conviction could not be regarded as a conviction for the purposes of section 21 (1) of the Act and it was not therefore permissible for the Judge to pass a sentence of corrective training.

No counsel appeared for the Crown.

THE LORD CHIEF JUSTICE: The appellant was convicted before Oliver, J., at the last Assizes for Lancashire of shopbreaking with intent to steal and was sentenced to three years' corrective training. He is twenty-one years of age, and has been convicted on two previous occasions, in March, 1950, at Workington Magistrates' Court of larceny, when he was fined, and in January, 1951, at Cumberland Quarter Sessions of breaking and entering and stealing, when he was put on probation for two years. During his period of probation he committed the offence of shopbreaking with intent. The learned Judge, in sentencing him, regarded those two convictions as convictions which would entitle him to pass a sentence of corrective training, and, no doubt in the appellant's own interests, sentenced him to three years' corrective training. He said that the appellant had shown some promise when he had been placed under discipline, and that if corrective training were a sentence which ought not to be passed the sentence would have been one of two years' imprisonment.

The simple point in the case is whether a conviction which resulted in a probation order can be treated as one of the two convictions which have to be proved before a sentence of corrective training can be passed. Section 12 (1) of the Criminal Justice Act, 1948, provides "Subject as hereinafter provided, a conviction of an offence for which an order is made under this Part of this Act placing the offender on probation or discharging him absolutely or conditionally shall be deemed not to be a conviction for any purpose other than the purposes of the proceedings in which the order is made and of any

1951.
*Oct.* 2.

JOHN STOBBART.

Goddard, L.C.J., Hilbery, J., Pilcher, J.

subsequent proceedings which may be taken against the offender under the foregoing provisions of this Act". It is, therefore, not to be used as a conviction for any other purpose. The provisions with regard to corrective training are contained, not in the foregoing provisions of the Act, but in subsequent provisions. Section 21 (1) provides that a sentence of corrective training can be passed "where a person who is not less than twenty-one years of age—(*a*) is convicted on indictment of an offence punishable with imprisonment for a term of two years or more"—as, the offence of shopbreaking with intent is—and "(*b*) has been convicted on at least two previous occasions since he attained the age of seventeen of offences punishable on indictment with such a sentence".

As the appellant has only been convicted once and punished by a fine, and on the second occasion was put on probation, it seems to the Court clear that the second offence did not result in a conviction which can be taken into account for the purposes of section 21. With all respect to the learned Judge, I think that the provisions of section 12 are clear. It seems odd that if a person has been placed on probation and breaks his recognisance he should not be subject to corrective training. He seems to be just the sort of person who might be a fit person for corrective training, but Parliament has taken a different view and has said that any offence for which he was put on probation is to be disregarded for any subsequent purpose.

That being the case, in the opinion of the Court there was no power to pass a sentence of corrective training and a sentence of two years' imprisonment will be substituted.

*Sentence varied.*

[DIVISIONAL COURT CASE]

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HILBERY AND MR. JUSTICE PILCHER.

1951.
*Oct. 5*

## BEAL *v.* KELLEY.

*Indecent Assault on Male—Invitation by Defendant to Boy to Behave Indecently towards him—Refusal—Hostile Act by Defendant—Offences against the Person Act*, 1861 (24 & 25 *Vict.*, *c.* 100), *s.* 62.

The defendant exposed himself and invited a boy of fourteen to handle him indecently, which the boy refused to do and tried to go away. The defendant then caught hold of the boy and pulled him towards himself.

*Held*, that as the defendant had committed a hostile act towards the boy accompanied by an act of indecency, he was guilty of an indecent assault on the boy.

Case stated by justices for the Liberty of Peterborough.

At a court of summary jurisdiction for the Liberty of Peterborough an information was preferred by the appellant, Supt. Reginald Arthur Beal, charging the respondent, Thomas Francis Kelley, with indecent assault on a boy aged fourteen. It was established that, when the respondent and the boy were together in a wood, the appellant exposed his person and asked the boy to handle it, which the boy refused to do and tried to go away, that the appellant then caught hold of the boy and pulled him towards himself. The justices, being of opinion that the offence " was in fact an attempt to procure the commission of an act of gross indecency with a male person ", which they had no jurisdiction to try summarily, dismissed the information.

The prosecutor appealed.

*G. R. Swanwick*, for the appellant:

The facts proved before the justices established an indecent

1951.
*Oct.* 5.

BEAL *v.* KELLEY.

Goddard, L.C.J., Hilbery, J., Pilcher, J.

assault. That there was an assault by the respondent on the boy is not disputed, and it was clearly accompanied by acts of indecency and made with an apparent indecent motive.

*M. D. Van Oss*, for the respondent:

To constitute an assault an indecent assault the assault itself must be of an indecent nature, and the state of mind of the person committing the assault is irrelevant. FISSINGTON *v.* HUTCHINSON (1886), 55 L. T. 390 established, in relation to an indecent assault on a female, that there must be an actual physical assault of an indecent nature, and the same principle should apply to indecent assault on a male person.

THE LORD CHIEF JUSTICE: This is a case stated by justices for the Liberty of Peterborough, before whom the respondent was charged with an indecent assault on a boy of fourteen. The justices dismissed the information because they thought that the offence "was in fact an attempt to procure the commission of an act of gross indecency with another male person", which they had no jurisdiction to try summarily. I will express no opinion whether they were right in that view or not or whether they were right in not at least at once charging the respondent with common assault and convicting him of that, because in my opinion they were quite wrong in taking the view that the conduct of the respondent was not an indecent assault.

The only facts which need be stated are these: the respondent, being by a wood with a boy of the age of fourteen, exposed his erect penis to the boy and asked him to get hold of it and rub it. The boy refused to do so, whereupon the respondent caught hold of him and pulled him towards himself. There at any rate, was the assault, a hostile act, because the act was against the boy's will. It does not matter that the boy could not give consent; the act was in fact against his will. It is said that that was not an indecent assault. Why not? In my opinion the definition given in *Archbold's Criminal Pleading, etc.* (32nd ed., p. 1067), of an indecent assault

1951. *Oct.* 5.

BEAL *v.* KELLEY.

Goddard, L.C.J., Hilbery, J., Pilcher, J.

is perfectly right: "An assault accompanied with circumstances of indecency on the part of the prisoner", that is to say, indecency offered towards the person alleged to have been assaulted. If a person is assaulted, that is to say, if there is a hostile act with every circumstance of indecency, I cannot see why it is not an indecent assault. If a man assaults a woman, at the same time exposing his person to her, I have no doubt that is an indecent assault on a female, just as I have no doubt that the conduct of the respondent was an indecent assault.

This case must go back to the justices with a direction to convict.

HILBERY, J.: I agree.

PILCHER, J.: I agree.

*Appeal allowed.*
*Case remitted with direction to convict.*

*Solicitors:* Sharpe, Pritchard & Co., agents for Peter Clarke, Town Clerk, Peterborough, for the appellant: C. Grobel, Son & Co., agents for Greenwoods, Peterborough, for the respondent.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HILBERY AND MR. JUSTICE PILCHER.

1951. *Oct.* 2, 8.

## FREDERICK HIGGINS.

*Sentence—Common Law Misdemeanour—Attempt to Commit Crime.*

A sentence of imprisonment for a term exceeding two years may lawfully be imposed in the case of any common law

misdemeanour, including any attempt to commit felony or misdemeanour which has not been made a specific statutory offence. Such a sentence should, however, be imposed only in the case of a serious crime, as exemplified in MORRIS (34 Cr. App. R. 210; [1951] 1 K. B. 394), or, where the misdemeanour is an attempt to commit a crime, where the convicted person is one who, if he had achieved his end, would obviously have received a severe sentence.

1951. *Oct.* 2, 8.

FREDERICK HIGGINS.

Goddard, L.C.J., Hilbery, J., Pilcher, J.

Appeal against sentence.

The appellant was convicted at Herts Quarter Sessions on June 18, 1951, of attempted housebreaking and was sentenced to three years' imprisonment.

*C. T. B. Leigh*, for the appellant:

It must be conceded, in view of the decision of this Court in MORRIS, 34 Cr. App. R. 210; [1951] 1 K. B. 394, that, the offence being a common law misdemeanour, the sentence was one which it was competent for the Court to pass, but it is submitted that it was too severe in all the circumstances, especially in view of the fact that the appellant had kept clear of crime for a year prior to the commission of the offence.

*Edward Clarke*, for the Crown.

*Cur. adv. vult.*

*October* 8.—The judgment of the Court was read by:

THE LORD CHIEF JUSTICE: The appellant was convicted at Herts Quarter Sessions of attempted housebreaking and sentenced to three years' imprisonment. He was given leave to appeal against sentence but not against conviction. In giving leave to appeal, the Court said that the charge upon which the appellant was convicted was a common law misdemeanour, for which normally the maximum punishment is two years' imprisonment, and the Court thought that, having regard to the fact that a question of law might be involved, he should have leave to appeal.

At the hearing counsel for the appellant did not contend that the sentence was one which could not lawfully be passed,

1951.
*Oct.* 2, 8.

FREDERICK HIGGINS.

Goddard, L.C.J., Hilbery, J., Pilcher, J.

conceding, as we think rightly, that that matter was concluded by the case of MORRIS, 34 Cr. App. R. 210; [1951] 1 K. B. 394. That case laid down that the law is and always has been that for a common law misdemeanour the Court can sentence to imprisonment and fine at discretion, provided that the sentence is not inordinate. It is unnecessary for us to restate at length the reasons for that judgment, but, in case there should be any doubt or misunderstanding with regard to attempts to commit felonies or misdemeanours, we will expand the judgment in that respect.

Attempts to commit crime are common law misdemeanours, but in six cases statutes have expressly dealt with attempts, thereby making them statutory offences, and have provided maximum punishments. Attempts to murder, contrary to sections 14 and 15 of the Offences against the Person Act, 1861, and attempts to choke, suffocate or strangle, contrary to section 21 of that Act, are both made statutory felonies with a maximum sentence of imprisonment for life. Attempts to commit buggery, contrary to section 62, are misdemeanours punishable with ten years' imprisonment, and attempts to have carnal knowledge of girls, whether under thirteen or under sixteen, are both expressly dealt with in the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), and are both punishable by imprisonment for two years. By the Attempted Rape Act, 1948 (11 & 12 Geo. 6, c. 19), attempted rape is punishable with seven years. All other attempts are misdemeanours at common law. Those misdemeanours were punishable only by simple imprisonment until certain statutory provisions enabled the punishment of hard labour to be added. Imprisonment with hard labour could only be imposed under statutory authority. The first of the Acts authorising this punishment was the Hard Labour Act, 1822 (3 Geo. 4, c. 114), and among the offences for which hard labour could be imposed was an attempt to commit a felony. Certain other offences were added by the Criminal Procedure Act, 1851, and there have been other statutes, which we need not enumerate, creating offences for which imprisonment with hard labour

could be awarded. Then in 1891 the Penal Servitude Act was passed (54 & 55 Vict. c. 69), where it was provided by section 1 (2) that " where under any Act now in force or under any future Act a Court is empowered or required to award a sentence of penal servitude, the Court may in its discretion, unless such future Act otherwise provides, award imprisonment for any term not exceeding two years, with or without hard labour ". It was that Act, as was pointed out in MORRIS'S CASE (*supra*) which enabled the Court to mitigate sentences for offences for which penal servitude, perhaps for seven or fourteen years, or even for life, could be given by passing a sentence of imprisonment for two years.

Finally, the Criminal Justice Administration Act, 1914 (4 & 5 Geo. 5, c. 58), s. 16, provides that " where a person convicted by or before any Court of an offence is sentenced to imprisonment without the option of a fine, the imprisonment may, in the discretion of the Court, be either with or without hard labour, notwithstanding that the offence is an offence at common law or that the statute under which the sentence is passed does not authorise the imposition of hard labour or requires the imposition of hard labour ".

But, as was also pointed out in MORRIS'S CASE (*supra*), the law with regard to common law misdemeanours remained the same, except that under the Act of 1914 hard labour could be imposed for a common law offence, but the limitation of two years is only to be found in the Penal Servitude Act where the Court passes a sentence of imprisonment instead of one of penal servitude because, if the offence was one punishable with penal servitude and the Court thought fit to pass it, it had to impose a sentence of not less than three years. An attempt to commit a crime, other than those enumerated above, was never punishable with penal servitude and therefore the provisions of that Act do not apply.

It was very largely because of that Act that the idea became general that no sentence of imprisonment could exceed two years, and we do not suppose, at any rate in modern times, that any sentence of imprisonment with hard labour for a

1951.
*Oct.* 2, 8.

FREDERICK HIGGINS.

Goddard, L.C.J., Hilbery, J., Pilcher, J.

period in excess of two years was ever passed. Penal servitude and imprisonment with hard labour are now abolished and accordingly there is no reason why a Court should not impose a longer sentence of imprisonment than two years except in cases where the period is limited by the statute creating the offence to two years or less. It may well be that a Court would consider a more severe sentence than two years should be imposed upon a man with a long record of crime who was attempting to commit a felony such as housebreaking or burglary, for which he would be liable perhaps to imprisonment for life, merely because he was disturbed during his attempt or for some other reason was unable to effect his purpose. At the same time we think that a sentence exceeding two years for a common law misdemeanour should only be imposed in serious cases, well illustrated by MORRIS'S CASE (*supra*), or, where the misdemeanour is an attempt to commit a crime, where the convicted person is one who, if he had achieved his end, would obviously have received a severe sentence.

In the present case, not only did Quarter Sessions not exceed their powers, but we can well understand that they thought they should exercise them on a man whose age is forty-one and who has had six convictions; but, by reason of certain facts which were brought to the attention of this Court and the fact that the appellant has only once been sent to prison, and then only for twelve months, and that he had been for a year out of trouble, the Court, with some hesitation, has decided to reduce the sentence and substitute one of twenty-one months.

To that extent the appeal succeeds.

*Sentence reduced.*

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HILBERY AND MR. JUSTICE PILCHER.

---

## ERNEST GEORGE FUSSELL.

1951.
*Oct.* 8.

*Sentence—Borstal Training—Validity of Conviction before Magistrates—Charge of Attempting to Take and Drive away Motor Car without Owner's Consent—Decision to Deal with Case Summarily—"Indictable Offence"—Criminal Justice Act*, 1925 (15 & 16 *Geo.* 5, *c.* 86), *s.* 24, *Sched. II, para.* 17—*Road Traffic Act*, 1930 (20 & 21 *Geo.* 5, *c.* 43), *s.* 28 (1)—*Criminal Justice Act*, 1948 (11 & 12 *Geo.* 6, *c.* 58), *s.* 20 (3).

The appellant appeared before the magistrates on a charge of attempting to take and drive away a motor car without the consent of the owner. The magistrates decided to deal with the case summarily, convicted the appellant and committed him for sentence, under section 20 (3) of the Criminal Justice Act, 1948, to quarter sessions. Quarter sessions passed a sentence of Borstal training.

*Held*, that the offence of taking and driving a motor vehicle without the owner's consent, being under section 28 (1) of the Road Traffic Act, 1930, triable either summarily or on indictment, was an indictable offence which might be dealt with summarily; that by virtue of para. 17 of the Second Schedule to the Criminal Justice Act, 1925, which entitles magistrates to deal summarily with attempting to commit any indictable offence which may be dealt with summarily, the magistrates had jurisdiction to deal summarily with the offence of attempting to take and drive away the motor car without the owner's consent; and that the conviction was, therefore, valid.

HASTINGS & FOLKESTONE GLASSWORKS, LTD., *v.* KALSON, [1948] 2 All E. R. 1013, referred to.

Appeal against sentence.

The appellant was convicted at a court of summary jurisdiction at Exeter of attempting to take and drive away a motor car without the owner's consent, and under section 20 (3) of the Criminal Justice Act, 1948, was committed to

1951.
*Oct.* 8.

ERNEST GEORGE FUSSELL.

Goddard, L.C.J., Hilbery, J., Pilcher, J.

Devonshire Quarter Sessions for sentence. On July 16, 1951, Quarter Sessions sentenced the appellant to Borstal training.

*W. H. E. James*, for the appellant:

The conviction before the magistrates was bad. They had no jurisdiction to deal with the offence charged, because it was not an indictable offence which could be dealt with summarily within the meaning of the Second Schedule to the Criminal Justice Act, 1925. [He referred to HASTINGS & FOLKESTONE GLASSWORKS, LTD. *v.* KALSON, [1948] 2 All E. R. 1013.]

*D. M. Scott*, for the Crown.

THE LORD CHIEF JUSTICE: The appellant was convicted before justices for the City of Exeter of attempting to drive away a motor car without the consent of the owner. The offence of driving away a motor car without the consent of the owner is a statutory offence created by section 28 of the Road Traffic Act, 1930. The justices, having convicted him of this offence, committed him to quarter sessions under section 20 (3) of the Criminal Justice Act, 1948, because they thought it was a case for Borstal training. Section 20 (3) provides: "Where a person is convicted by a court of summary jurisdiction of an offence punishable on summary conviction with imprisonment, then if on the day of his conviction he is not less than sixteen but under twenty-one years of age, and the court is satisfied of the matters mentioned in sub-section 1 of this section, the Court may commit him in custody to quarter sessions for sentence in accordance with the following provisions of this section".

As everybody knows, justices sitting as a court of summary jurisdiction can, if they convict a youth whom they think should go to Borstal, commit him for sentence to quarter sessions and quarter sessions decide whether he shall be so sentenced. The point taken by Mr. James, on a doubt expressed in Stone's *Justices' Manual* (83rd ed., Vol. 2, p. 2078),

1951.
*Oct.* 8.

ERNEST GEORGE FUSSELL.

Goddard, L.C.J., Hilbery, J., Pilcher, J.

whether the offence was triable summarily with consent or only on indictment, was that the justices had no jurisdiction to deal with the matter because the offence of taking and driving away a motor car is not an indictable offence which can be dealt with summarily with the consent of the prisoner within the meaning of the Second Schedule to the Criminal Justice Act, 1925. Section 24 of that Act, which superseded the old section of the Summary Jurisdiction Act, 1879, laid down that in the case of the offences set out in the Second Schedule to the Act justices might deal with indictable offences summarily. There are many statutes which create offences and provide that they may be dealt with summarily or on indictment. In the case of such an offence the prosecution often say that they do not regard the case as a serious one and ask the justices to deal with it summarily, and the prisoner does not exercise his right to go before a jury. The justices are not bound to treat the offence as a summary offence. For instance, in a case of dangerous driving the justices may say, when they have heard something of the case: "We think this is a serious case; we are going to commit for trial".

In this particular case the justices thought that they could deal with it summarily, and they were quite entitled to do so because the Second Schedule to the Criminal Justice Act, 1925, includes in paragraph 17: "Aiding, abetting, counselling or procuring the commission of any indictable offence which may be dealt with summarily, or attempting to commit any such offence", that is, any indictable offence which may be dealt with summarily.

The case to which Mr. James drew our attention, HASTINGS & FOLKESTONE GLASSWORKS, LTD. *v.* KALSON, [1948] 2 All E. R. 1013, lays down in the clearest possible terms that if an offence is one which can, under the statute, be tried either summarily or on indictment, that is for all purposes an indictable offence. There the defendant director had been convicted of an offence under a Defence Regulation which was punishable either summarily or on indictment and had been dealt with summarily, and it was held he had been convicted of an indictable

1951.
*Oct.* 8.

ERNEST GEORGE FUSSELL.

Goddard, L.C.J., Hilbery, J., Pilcher, J.

offence. So here it seems to me that the offence of taking and driving away a motor car without the consent of the owner can be dealt with summarily or on indictment. Therefore, as the appellant attempted to commit the offence, it comes within the very words of the Second Schedule to the Criminal Justice Act, 1925; he has attempted to commit an indictable offence. Therefore the justices, if they thought fit, could deal with him and, as they have dealt with him, there is no reason for interfering, and it is not suggested it was not a proper case for Borstal training if the appellant was properly before quarter sessions.

*Appeal dismissed.*

---

*Solicitors*: White & Leonard, agents for Cocks and Ashford, Exeter, for the Crown.

---

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HILBERY AND MR. JUSTICE SLADE.

---

1951.
*Oct.* 17.

## FAIRCLOUGH *v.* WHIPP.

*Indecent Assault—Child—Indecent Exposure by Prisoner—Invitation to Child to Touch.*

The respondent exposed himself in the presence of a girl aged nine, and invited her to touch his exposed person, which she did.

*Held*, that an invitation to another person to touch the invitor could not amount to an assault on the invitee, and that, as nothing had been done by the respondent to the child which, if done against her will, would have amounted to an assault on her, the conduct of the respondent did not constitute an indecent assault on the child.

1951.
*Oct.* 17.

FAIRCLOUGH *v.* WHIPP.

Goddard, L.C.J., Hilbery, J., Slade, J.

Case stated by Clitheroe justices.

At a court of summary jurisdiction for the borough of Clitheroe, an information was preferred by the appellant, Ernest Fairclough, a police officer, charging the respondent, Jack Whipp, with indecent assault on a girl aged nine.

The respondent was urinating by the bank of a canal, when the girl in question and several other girls of about the same age passed him. The respondent, with his person still exposed, said to the girl in question: "Touch it", which she did. The respondent then drove off in a motor vehicle. The justices dismissed the information.

The prosecutor appealed.

*W. H. Openshaw*, for the appellant, referred to LOCK (1872), 2 L. R. C. C. R. 10.

The respondent did not appear and was not represented.

THE LORD CHIEF JUSTICE: This is a case stated by justices for the borough of Clitheroe, before whom the respondent was charged with committing an indecent assault on a child of the age of nine. It was a disgusting case, but the question is whether there was an assault.

The respondent was apparently making water by the bank of a river or canal where there were some four young girls varying in age from six to nine. Just as he was making water the girl in question passed him and he, with his person exposed, said to her, "Touch it", and she did touch it. He then got into his cab and drove off. The question is whether that conduct amounts to an indecent assault.

It is unnecessary to go into any old learning on what constitutes an assault. An assault can be committed without there being battery, for instance, by a threatening gesture or a threat to use violence made against a person, but I do not know of any authority that says that, where one person invites another person to touch him, that can amount to an assault. The question of consent or non-consent arises only if there is something which, without consent, would be an assault on the latter.

1951.
*Oct.* 17.

FAIRCLOUGH *v.* WHIPP.

Goddard, L.C.J., Hilbery, J., Slade, J.

If that which was done to the child would have been an assault if done against her will, it would also be an assault if it was done with her consent and is of an indecent nature, because she cannot consent to an indecent assault. But before we come to the question whether there was an indecent assault we must consider whether there was an assault, and I cannot hold that an invitation to somebody to touch the invitor can amount to an assault on the invitee. It might be a very good thing if Parliament passed an Act providing that any indecent conduct in the presence of a child or in relation to a child—or in any form of words the draftsman saw fit to use—should be punishable, but at present the law has not gone beyond saying that an indecent assault on a child is punishable whether the child consents or not. It is obvious, therefore, that the offence must be one which can amount to an assault in law.

Mr. Openshaw called our attention to LOCK (1872), 2 L. R. C. C. R. 10, the facts of which were very different from the facts of the present case. It was a case of assault on boys and there is no question there had been an assault because the prisoner had been playing with their private parts, and Kelly, C.B., said (at p. 12): "The question is, whether such an act as that of the prisoner done to a person who does not actively consent, but merely submits to the act under circumstances in which he cannot exercise his will either one way or the other does not, even in the absence of fraud, amount to an assault". It seems to me there must be an act done to a person. The respondent might have been charged with an offence under the Vagrancy Act, 1824. I do not want to express a confident opinion on that matter, because under that Act there has to be indecent exposure with intent to insult a female. It might be that a child of tender years would be a female within the Act, but at any rate the offence could not be other than that of indecent exposure, and it is not necessary to express an opinion whether it would be indecent exposure within the meaning of the Vagrancy Act.

In all the circumstances, with the same regret which I have

no doubt the justices felt, I am bound to say that I think they came to a right decision and this appeal must be dismissed.

1951. *Oct.* 17.

FAIRCLOUGH *v.* WHIPP.

Goddard, L.C.J., Hilbery, J., Slade, J.

HILBERY, J. : I agree.

SLADE, J. : I agree.

*Appeal dismissed.*

*Solicitors* : Norton, Rose, Greenwell & Co., agents for H. Adcock, Preston, for the respondent.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HILBERY, MR. JUSTICE FINNEMORE, MR. JUSTICE SLADE AND MR. JUSTICE DEVLIN.

## ARTHUR GEORGE WHYBROW.

1951. *Oct.* 22.

*Summing-up—Misdirection in Law—Attempted Murder—No substantial Miscarriage of Justice—Proviso Applied—Criminal Appeal Act*, 1907 (7 *Edw.* 7, *c.* 23), *s.* 4 (1).

Proviso to section 4 (1) of the Criminal Appeal Act, 1907, applied, despite a misdirection in law on the intent necessary to constitute attempted murder, on the ground that a reasonable jury, properly directed, would without doubt have convicted on the evidence.

COHEN AND BATEMAN (1909), 2 Cr. App. R. 197, at p. 207, and STIRLAND *v.* DIRECTOR OF PUBLIC PROSECUTIONS, 30 Cr. App. R. 40, at p. 46; [1944] A. C. 315, at p. 321, referred to.

Appeal against conviction.

The appellant was convicted at Essex Assizes on June 12, 1951, of attempted murder of his wife and was sentenced by Parker, J., to ten years' imprisonment.

1951.
*Oct.* 22.

ARTHUR GEORGE WHYBROW.

Goddard, L.C.J., Hilbery, J., Finnemore, J., Slade, J., Devlin, J.

The case for the prosecution was that the appellant had administered an electric shock to his wife while in a bath, by means of an apparatus which he had himself constructed, and the material particulars of which appear in the judgment, with intent to murder her. The defence throughout the trial was that of accident, the appellant contending that he had constructed the apparatus for an innocent purpose. Parker, J., directed the jury that if they were satisfied that the appellant had constructed the apparatus in the manner alleged by the prosecution, and if they were further satisfied that in doing so the appellant intended to kill his wife or do her grievous bodily harm, then he would be guilty of attempted murder. It was conceded that that was a misdirection in law.

*Derek Curtis-Bennett, K.C.*, and *G. Hardy*, for the appellant:

Where there has beeen a clear misdirection in law, it is established that this Court will allow the appeal unless the prosecution can bring the case within the proviso to section 4 (1) of the Criminal Appeal Act, 1907. The circumstances of the case must establish that a reasonable jury, properly directed, would without doubt have convicted, and this Court never constitutes itself a new jury. [He referred to STIRLAND *v.* DIRECTOR OF PUBLIC PROSECUTIONS, 30 Cr. App. R. 40, at p. 47; [1944] A. C. 315, at p. 321.] The evidence that the apparatus which the appellant fitted up was intended to do harm to his wife was overwhelming. The fact that the defence of accident was negatived by the jury merely shows that they were satisfied that the appellant's act was malicious. There was evidence that a lamp which was fitted to the circuit would very much reduce the effect of the shock and that the appellant had electrical experience. The Judge thought it proper to direct the jury on the question of the intent to cause grievous bodily harm, and in view of the Judge's misdirection, no one can say whether the jury regarded the case as one of attempted murder done with intent to kill or as one of attempted murder done with intent to cause grievous bodily harm. If the Judge, as he

1951.
*Oct.* 22.

ARTHUR GEORGE WHYBROW.

Goddard, L.C.J., Hilbery, J., Finnemore, J., Slade, J., Devlin, J.

should have done, had eliminated the latter intent from his definition of attempted murder, it cannot be regarded as certain that the jury would have convicted. [He referred also to FRIPP AND JONES (1942), 29 Cr. App. R. 6, at p. 9; and FARID (1945), 30 Cr. App. R. 168, at p. 181.]

*Melford Stevenson, K.C.*, and *Anthony Harmsworth*, for the Crown:

It is conceded that the passage complained of in the summing-up amounted to a misdirection, though at a later stage in the summing-up the Judge did put the real issue correctly. A reasonable jury, properly directed, would without doubt have come to the conclusion that the appellant intended to kill his wife. There was strong evidence that he had transferred his affections elsewhere and wanted to get rid of her. His conduct was not the result of sudden temper or passion. The device had been constructed a considerable time before, and was an elaborate and well thought out piece of work. The defence never suggested in any shape or form that there was an intent to injure only. The insertion of the lamp may well have been due to ignorance on the appellant's part. When the wife complained of electric shock, the appellant remained completely inactive as regards investigation or explanation.

*Derek Curtis-Bennett, K.C.*, in reply:

The later passage in the summing-up could not remove the mischief done by the earlier one.

THE LORD CHIEF JUSTICE: The appellant was convicted before Parker, J., at the last Assizes for Essex of the attempted murder of his wife. He appealed to this Court and it is not without some significance that his notice of appeal in no way raised the question with which this Court has been concerned, but was merely a repetition, with some elaboration, of the defence which he raised at the trial, which was that the whole affair was an accident and that he had not the smallest intention of injuring his wife in any way.

1951.
*Oct.* 22.

ARTHUR GEORGE WHYBROW.

Goddard, L.C.J., Hilbery, J., Finnemore, J., Slade, J., Devlin, J.

The facts of the case, so far as it is necessary to state them, are these: the appellant was living on bad terms with his wife and it was shown that at the time he, a married man with a family, was carrying on a liaison with another young woman. That, of course, was put forward as the motive, and, indeed, it is the oldest motive in the world that is brought up in cases of murder or attempted murder of a wife. It was proved to exist and a letter was produced from the appellant to that young woman's father which could leave no doubt in anybody's mind that the appellant's affections had been transferred to that young woman.

The appellant had had some, but no very great, experience of electrical installations. He had been a labourer in the employ of the electrical department of the Southend Corporation Electricity Works and had no doubt, on occasions, gone round with electricians. He also had had a wireless apparatus and so forth in his house and probably had what may be described as an amateur's knowledge of electricity. On the night of the alleged crime the wife was taking a bath and the appellant was in an adjoining room. He said that he was in the lavatory, but he might equally well have been in the bedroom. The wife was heard to call out, and she complained of having received an electric shock while in the bath. The next day it came to light that an apparatus had been connected with the soap dish, the bath being a porcelain bath and either the soap dish itself or its support being made of metal. An apparatus was found connected with this soap dish which, if prepared intentionally, showed a deliberate, cold-blooded resolve to administer a shock of 230 volts of electricity to a woman in her bath. It is common knowledge, and the appellant admitted that he knew it, that to administer an electric shock to a person in a bath is the most dangerous thing that can be done in that way. He admitted in cross-examination that he "had heard of people getting killed by electric shocks and particularly in bathrooms"; and I suppose it is one of the things that most people know nowadays, that an electric shock in the bathroom when the body is wet is much more

probable to have fatal results that in any other circumstances. It is unnecessary to describe the apparatus which the appellant fixed up in any detail. In one sense it was crude and in another sense it was elaborate, because it was taken up to the roof and behind the tiles and so forth, with the obvious design of concealment so that no alarm would be caused or suspicion aroused in anybody's mind, because nobody would see this thing unless it was specially investigated. The source of the electricity was from the bedroom and this contraption, which had been devised by the appellant, was connected to the domestic supply by a three-point power plug.

The appellant's explanation with regard to this contrivance he had made was that it had something to do with providing an earth from his bedroom for a wireless set there, an explanation which can properly be described as fanciful or fantastic and one which it would be impossible to believe that any serious jury could accept. But, although given every opportunity and, indeed, being pressed in cross-examination to give some account of his reason for fixing one end of this contraption to the soap dish, he could give no explanation at all. In fact, what he said was that he wanted to leave the ends in the air. Instead of leaving the ends in the air, he had attached them, and did not deny that he had attached them, to the soap dish. Therefore, the facts of the case showed not that something was done on the spur of the moment, or as the result of a sudden quarrel, which, as everybody knows, is the element that surrounds a wounding with intent to do grievous bodily harm, but showed elaboration long thought out and carefully planned for which the only reason could have been to administer an electric shock to a person who touched the soap dish.

The appellant's defence was that he had no intention of injuring or killing his wife. He suggested first that his wife was an imaginative person who was always thinking that she was getting electric shocks when she was not, and secondly, that if she did get an electric shock, in some way or other it was due to a leakage of electricity in the house; whereas, of course, the plain fact was that, if she did get an electric shock,

1951.
*Oct.* 22.

ARTHUR GEORGE WHYBROW.

Goddard, L.C.J., Hilbery, J., Finnemore, J., Slade, J., Devlin, J.

it was due to this contrivance which could have been fixed up for no other reason. I ought to have said that on this contrivance was a small electric lamp, and the evidence was that the presence of that electric lamp would set up a resistance to such an extent that the discharge of electricity to the soap dish would be very much reduced. The appellant gave no explanation for the presence of that lamp on the flex with a view to suggesting that he realised that it would cause resistance so that, if the electricity did get to the soap dish, it would not have been sufficient to cause death or do any injury. It might, in the course which this case has taken, have been somewhat material if he had said in his evidence: "I knew perfectly well that if I put a lamp where I did that that would reduce the discharge of electricity"—if that is the right expression to use—"at the soap dish to such an extent that it would be harmless and therefore it did not occur to me that anybody could be injured by it". It may be he did not know it, but at any rate he gave no explanation and this case was presented from first to last by the prosecution as a deliberate attempt to murder, and by the defence as an accident, if the woman ever got a shock at all.

The case lasted two days and the learned Judge's summing-up, so far as the facts were concerned, was meticulously careful and meticulously accurate, but unfortunately he did, in charging the jury, confuse in his mind for a moment the direction given to a jury in a case of murder with the direction given to a jury in a case of attempted murder. In murder the jury is told—and it has always been the law—that if a person wounds another or attacks another either intending to kill or intending to do grievous bodily harm, and the person attacked dies, that is murder, the reason being that the requisite malice aforethought, which is a term of art, is satisfied if the attacker intends to do grievous bodily harm. Therefore, if one person attacks another, inflicting a wound in such a way that an ordinary, reasonable person must know that at least grievous bodily harm will result, and death results, there is the malice aforethought sufficient to support

the charge of murder. But, if the charge is one of attempted murder, the intent becomes the principal ingredient of the crime. It may be said that the law, which is not always logical, is somewhat illogical in saying that, if one attacks a person intending to do grievous bodily harm and death results, that is murder, but that if one attacks a person and only intends to do grievous bodily harm, and death does not result, it is not attempted murder, but wounding with intent to do grievous bodily harm. It is not really illogical because, in that particular case, the intent is the essence of the crime while, where the death of another is caused, the necessity is to prove malice aforethought, which is supplied in law by proving intent to do grievous bodily harm.

The indictment in this case contained only one count, which charged attempted murder. As there was neither stabbing, cutting nor wounding, no other verdict was open to the jury except Guilty or Not Guilty, because it is only where there is stabbing, cutting or wounding that in an indictment for attempted murder the jury can, under the Prevention of Offences Act, 1851, return a verdict of malicious wounding. Very often where there is a charge of attempted murder, arising from an attack with a gun or a knife or a dagger or something of that sort, a count is put into the indictment charging wounding with intent. It has to be borne in mind that, when these Acts were passed in the 50's and 60's, electricity was in a very different position from what it is now, and when a person is being charged with administering an electric shock with intent to murder, recourse is had to the section of the Offences against the Person Act, s. 15, which deals with attempting to murder in any way whatsoever. Section 15 provides: "Whosoever shall, by any means other than those specified in any of the preceding sections of this Act",—which deal with shooting, stabbing, etc.—"attempt to commit murder, shall be guilty of felony, and being convicted thereof shall be liable to imprisonment for life".

The learned Judge, as I say, had in his mind the charge which is given to a jury in a case of murder, because he

1951.
*Oct.* 22.

ARTHUR GEORGE WHYBROW.

Goddard, L.C.J., Hilbery, J., Finnemore, J., Slade, J., Devlin, J.

directed them: "If you are satisfied beyond all reasonable doubt that on that evening of the 30th April he did connect up this wire in such a way that it would pass the domestic supply in the skirting of the bedroom along the wire to the socket in the cupboard, which in turn was connected with the soap dish, and if you are further satisfied that in doing that he intended to kill his wife or to do her grievous bodily harm, then he would be guilty of attempted murder". Then he went on: "You will notice there, members of the jury, that I said if you are satisfied that, first of all, he made those connections with the wires and, secondly, that he intended to kill or do grievous bodily harm. I added those words, members of the jury, because (it is really commonsense) if a man does an act, intending to do another grievous bodily harm, and death results, it is murder"—that is right—"just the same as if he intended to murder. In other words, he acts at his own risk, and he cannot turn round afterwards and say: 'Oh; I did not mean to murder her. I only intended to do her grievous bodily harm'".

There is no question that that was a misdirection, and the jury should have been told that the essence of the offence was the intent to murder as it was presented by the prosecution and as it had been dealt with throughout the case. Later on the learned Judge put the case, if one may use the expression in a matter of this sort, in a nutshell. He passed away from the question of intent and said: "Then he is asked whether, if he found this apparatus fitted up, that is to say, the wire, the plug inserted into the power point and the split pin into the cupboard, he would not consider it dangerous to anybody who was in the bath, and to his wife if she was in the bath, and he said this: 'I realised that she might be killed'. The importance, perhaps, of that, members of the jury, is that you may think this becomes a direct issue: Was this inserted deliberately by him to kill, or was it not inserted at all and was the shock an accident?" That put the matter exactly on the basis on which the case had been fought from first to last. Indeed, now that this Court has seen the evidence

1951.
*Oct.* 22.

ARTHUR GEORGE WHYBROW.

Goddard, L.C.J., Hilbery, J., Finnemore, J., Slade, J., Devlin, J.

and carefully read the appellant's evidence, supposing there had been a count in the indictment here for attempting to do grievous bodily harm, it would have been a very difficult matter upon which to charge a jury and I should think the jury might very well have been charged by the learned Judge putting the case in this way: "This is a case in which I should advise you to consider it from the point of view of attempted murder or nothing". The learned Judge did point out to the jury that if this had been done merely to annoy, that is to say, to give a very slight shock which would merely make a person jump, then nobody would say that that was attempted murder. But all the facts here show that the thing was deliberate, carefully planned, and no suggestion was made that the appellant wanted to injure his wife in the sense of doing her some injury short of death. The suggestion of the prosecution throughout was that he wanted to get rid of his wife so that he could turn his affections legitimately to the other young woman. On the other hand his defence was: "I had nothing to do with it at all, nothing in the shape of wanting to injure my wife. If this woman was injured, she was injured by an accident and this contraption I fixed up was only concerned with my wireless", although he could give no explanation why he had attached it to the soap dish.

When this appeal was launched by the appellant, he took no objection or any point at all on the summing-up; he simply repeated his defence that he never intended to do any injury to his wife. That was a matter which this Court, which does not set itself up to be a jury, would not have entertained. That was a matter for the jury and the jury, by their verdict, have clearly shown that they regarded this as a deliberate, calculated action. If a man who does not pretend that he has no knowledge of electricity or its effects is found by a jury to be intentionally endeavouring to put electricity at a voltage of 230 volts into his wife while she is in a bath, is there any other reasonable conclusion except that he intended to murder her?

1951.
*Oct.* 22.

ARTHUR GEORGE WHYBROW.

Goddard, L.C.J., Hilbery, J., Finnemore, J., Slade, J., Devlin, J.

When this case first came before the Court on an application, the Court observed the unfortunate direction which had been given by the learned Judge in the opening part of his summing-up and, although the appellant had not raised the point, it appeared at once to deserve consideration by this Court. It was on that ground we gave leave to appeal. When the case was argued before a Court of three Judges last week, we thought it was sufficiently grave and raised a sufficiently important point to assemble a full Court of five Judges to consider the application of what is generally called the proviso.

Section 4 of the Criminal Appeal Act, 1907, is in these terms: "The Court of Criminal Appeal on any such appeal against conviction shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence",—no one ventures to say in this case that the verdict of the jury was unreasonable or could not be supported —"or that the judgment of the Court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law"—that cannot arise—"or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal".

Then the proviso is: "Provided that the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred". That proviso has been the subject of many statements and much consideration in this Court. The judgment which is often regarded as the classic judgment is that delivered by Channell, J.—and certainly any judgment of that learned Judge is always worthy of the most careful consideration—in COHEN AND BATEMAN, [1909] 2 Cr. App. R. 197, at p. 207. In that case the learned Judge did not say, as it is sometimes thought that he said, that wherever there was misdirection on a point of law the appeal must succeed. He pointed out that it must succeed unless the proviso could be applied, and that one reason why it must

1951.
*Oct.* 22.

ARTHUR GEORGE WHYBROW.

Goddard, L.C.J., Hilbery, J., Finnemore, J., Slade, J., Devlin, J.

succeed was because it would take away from the prisoner a chance of acquittal, but he did not in any way limit his judgment by saying that the proviso could not be applied in the case of misdirection. In fact he said it could be. The judgment states (at p. 207): "There is such a miscarriage of justice not only where the Court comes to the conclusion that the verdict of Guilty was wrong, but also when it is of opinion that the mistake of fact or omission on the part of the Judge may reasonably be considered to have brought about that verdict, and when, on the whole facts and with a correct direction, the jury might fairly and reasonably have found the appellant Not Guilty. Then there has been not only a miscarriage of justice but a substantial one, because the appellant has lost the chance which was fairly open to him of being acquitted, and therefore, as there is no power of this Court to grant a new trial, the conviction has to be quashed. If, however, the Court in such a case comes to the conclusion that, on the whole of the facts and with a correct direction, the only reasonable and proper verdict would be one of Guilty, there is no miscarriage of justice, or at all events no substantial miscarriage of justice within the meaning of the proviso, notwithstanding that the verdict actually given by the jury may have been due to some extent to such an error of the Judge, not being a wrong decision of a point of law". He in no way suggested that the proviso should not be applied in a case where there had been a misdirection on a point of law and, when the proviso was considered in the House of Lords—in STIRLAND *v.* DIRECTOR OF PUBLIC PROSECUTIONS, 30 Cr. App. R. 40; [1944] A. C. 315—their Lordships had to consider in that case a direction which they came to the conclusion was wrong in point of law. They also had to consider the passage in the speech of the Lord Chancellor (Lord Sankey) in WOOLMINGTON *v.* DIRECTOR OF PUBLIC PROSECUTIONS, 25 Cr. App. R. 72, at p. 96; [1935] A. C. 462, at p. 483, where he had used the word "inevitable". He said in that case a Court could not apply the proviso if there had been a misdirection on a point of law unless they were of opinion that a jury would inevitably have

1951.
*Oct.* 22.

ARTHUR GEORGE WHYBROW.

Goddard, L.C.J., Hilbery, J., Finnemore, J., Slade, J., Devlin, J.

come to the same conclusion; but Viscount Simon said in STIRLAND'S CASE, (30 Cr. App. R., at p. 46; [1944] A. C. at p. 321): "It is evident that no reasonable jury, after a proper summing-up, could have failed to convict the appellant on the rest of the evidence to which no objection could be taken. There was, therefore, no miscarriage of justice and this is the proper test to determine whether the proviso to section 4 (1) of the Criminal Appeal Act, 1907, should be applied. The passage in WOOLMINGTON *v.* DIRECTOR OF PUBLIC PROSECUTIONS (*supra*) where Viscount Sankey, L.C., observed that in that case, if a jury had been properly directed, it could not be affirmed that they would have 'inevitably' come to the same conclusion should be understood as applying this test. A perverse jury might conceivably announce a verdict of acquittal in the teeth of all the evidence; but the provision that the Court of Criminal Appeal may dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred in convicting the accused assumes a situation where a reasonable jury, after being properly directed, would, on the evidence properly admissible, without doubt convict".

In considering whether the proviso is to be applied in any particular case this Court must consider the whole of the circumstances of the case. We do not for an instant wish to put ourselves into the position of the jury. We take the verdict of the jury, which is one of Guilty and which means that the jury are satisfied that the prisoner did do a criminal act. We then have to see how far the case is affected by the wrong direction given by the presiding Judge, and we must take the whole of the facts into account and regard the whole of the circumstances. As I have already said, there was at the outset of the summing-up a mistake made by the learned Judge, who was thinking, if I may put it compendiously, in terms of murder and not in terms of attempted murder. There was next the direction given by the learned Judge at a much later stage of the summing-up, when he said to the jury: "You may think this becomes a direct issue: Was this inserted deliberately by him to kill or was it not inserted at all and

1951.
*Oct.* 22.

ARTHUR GEORGE WHYBROW.

Goddard, L.C.J., Hilbery, J., Finnemore, J., Slade, J., Devlin, J.

was the shock an accident?" That put the matter fairly and squarely before them. Could any reasonable jury, once it was established, as it was established, that this deadly contrivance had been used with cold-blooded deliberation, because it had been prepared some time before and left there, when the only explanation given was one which no person could possibly accept, have come to the conclusion that in attempting to put the voltage of electricity to be found in the ordinary domestic supply through that woman while she was in her bath the appellant had any intent other than to murder her?

This Court, after mature deliberation, having carefully considered the summing-up and the evidence before we came into Court, and having heard the submissions clearly and forcibly put by Mr. Curtis-Bennett, has come to the conclusion that there was no substantial miscarriage of justice and is unanimously of opinion that this is a case in which the Court should apply the proviso. Therefore, although there was a misdirection in the summing-up, the Court refuses to interfere with the verdict and the appeal is dismissed.

*Appeal dismissed.*

*Solicitors*: Drysdale, Lamb & Jackson, for the appellant.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SLADE AND MR. JUSTICE DEVLIN.

WILFRED MAYO.

1951.
*Oct.* 23.

*Sentence—Supervision Order—Criminal Justice Act*, 1948 (11 & 12 *Geo.* 6, *c.* 58), *s.* 22.

Where a prisoner has become liable to the provisions of section 22 of the Criminal Justice Act, 1948, but the Court decides not to make an order under that section, the Court

1951.
*Oct.* 23.

WILFRED MAYO.

Goddard, L.C.J., Slade, J., Devlin, J.

should state that it is expressly refraining from making such an order and its reasons for doing so.

Application for leave to appeal against conviction.

The applicant was convicted at Staffordshire Assizes on July 4, 1951, of incest and was sentenced by Lynskey, J., to five years' imprisonment.

The applicant came within the provisions of section 22 of the Criminal Justice Act, 1948, relating to a supervision order, but the Judge, having regard to the nature of the crime and the length of the sentence, determined not to make any such order, though he did not state his determination in Court.

No counsel appeared.

DEVLIN, J.: This is an application for leave to appeal against conviction. The applicant was convicted of incest with his daughter and sentenced to five years' imprisonment.

There is no point of law or ground of misdirection raised in the notice of appeal, which consists simply of a repetition of the defence that the story was a conspiracy between the applicant's wife and his daughter. That defence the jury rejected and there is therefore no ground for interfering with the conviction.

There is no appeal against sentence, but the Court has observed that this is a case to which section 22 of the Criminal Justice Act, 1948, applies. That section provides: "Where a person is convicted on indictment of an offence punishable with imprisonment for a term of two years or more and that person—(a) has been convicted on at least two previous occasions of offences for which he was sentenced to Borstal training or imprisonment; or (b) has been previously convicted of an offence for which he was sentenced to corrective training, the Court, if it sentences him to a term of imprisonment of twelve months or more, shall, unless having regard to the circumstances, including the character of the offender, it otherwise determines, order that he shall for a period of twelve months from his next discharge from prison be subject to the provisions of this section".

1951.
*Oct.* 23.

WILFRED MAYO.

Goddard, L.C.J., Slade, J., Devlin, J.

The learned Judge of Assize who sentenced the appellant did not make an order under section 22. The Court has learned that that was not due to any omission on his part to note the provisions of section 22; he refrained from making an order because he considered that, having regard to the nature of the crime and the length of the sentence, he did not think it a proper case.

We think that, where a Judge is of that opinion, he ought to express his determination as section 22 requires, because if he fails to do so there is the danger that this Court may think the point has been overlooked and may not know that the Judge has considered the matter and exercised his powers under the section.

*Appeal dismissed.*

---

[DIVISIONAL COURT CASE]

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SLADE AND MR. JUSTICE DEVLIN.

---

## REX *v.* RECORDER OF GRIMSBY; *Ex p.* PURSER.

1951.
*Oct.* 24, 25.

*Sentence—Borstal Training—Committal by Magistrates to Quarter Sessions—Validity of Committal—Admission as to Age by Defendant before Magistrates—No Evidence on Oath before Magistrates—Criminal Justice Act*, 1948 (11 & 12 *Geo.* 6, *c.* 58), s. 20 (1), (3), (5).

The respondent, a boy of seventeen years of age, pleaded guilty to larceny at a magistrates' Court. Before taking his plea, the clerk of the Court had asked the respondent his age, and the respondent stated that he was seventeen. There was no further proof of age, and no evidence was given on oath before the magistrates, but a police officer made a statement of the facts of the case and the antecedents of the respondent, and the magistrates had before them a report from the Prison Commissioners under section 20 (7) of the Criminal Justice

1951.
*Oct.* 24, 25.

REX *v.* RECORDER OF GRIMSBY, *Ex p.* PURSER.

Goddard, L.C.J., Slade, J., Devlin, J.

Act, 1948. The magistrates committed the respondent, under section 20 (3) of the Act, to quarter sessions with a view to a sentence of Borstal training being passed, but the Recorder accepted a submission on behalf of the respondent that the committal was bad on the grounds that no proper evidence of the respondent's age had been given before the magistrates and that the magistrates had heard no evidence on oath, and declined to pass sentence, ordering that the respondent be discharged from custody.

*Held*, that the magistrates, in a case where they had no reason to doubt the respondent's admission as to his age, were entitled to accept that admission, and no further proof of age was necessary; that the magistrates could, within the meaning of section 20 (3), be satisfied of the matters mentioned in subsection (1), that is to say, the character and conduct of the appellant, the circumstances of the case, and the suitability of the respondent for Borstal training, without hearing evidence on oath; that the Recorder was wrong in holding that the committal was bad and was not entitled to refuse to accept jurisdiction; and that *certiorari* must issue to quash his order discharging the respondent from custody and *mandamus* must issue directing him to sentence the respondent.

Observations on the procedure in a Court of summary jurisdiction on a plea of Guilty.

Motions for orders of *certiorari* and *mandamus*.

The respondent Middleton, who was seventeen years of age, appeared before the Grimsby Magistrates' Court charged with stealing a cycle. The magistrates consented to deal with the case summarily. Before the respondent was called on to plead, the clerk of the Court asked him his age, which the respondent stated to be seventeen. The respondent then pleaded Guilty to the charge and asked that other offences should be taken into consideration. No further evidence of the respondent's age was given, and the magistrates did not hear any evidence on oath, but the police officer in charge of the case made a statement of the facts of the case and the antecedents of the respondent. At an adjourned hearing, the magistrates had before them a report from the Prison Commissioners under section 20 (7) of the Criminal Justice Act, 1948, which stated that the respondent was physically and mentally suitable for

1951.
*Oct.* 24, 25.

REX *v.* RECORDER OF GRIMSBY, *Ex p.* PURSER.

Goddard, L.C.J., Slade, J., Devlin, J.

Borstal training. The magistrates committed the respondent to Grimsby Quarter Sessions for sentence under section 20 (3) of the Act, with a view to a sentence of Borstal training being passed. At Grimsby Quarter Sessions on July 19, 1951, a submission was made by counsel for the respondent that the committal was bad by reason of the facts that there had been no proper proof of the respondent's age before the magistrates and that the magistrates had heard no evidence on oath. Counsel for the prosecution desired to call respondent's mother to give strict proof of the respondent's age. The Recorder declined to hear that evidence and held that the submission made on behalf of the respondent was good. He declined to pass sentence and ordered that the respondent be discharged from custody. The prosecutor, Inspector Purser, obtained leave to apply for an order of *certiorari* quashing the order of the Recorder discharging Middleton, and for an order of *mandamus* directing the Recorder to pass sentence on Middleton.

*G. D. Roberts, K.C.*, and *J. Malcolm Milne*, for the applicant:

It is submitted, first of all, that the Recorder had no jurisdiction to inquire into the validity of the committal. His duties are presented by secton 20 (5) of the Act, and he was bound to inquire into the circumstances of the case and the antecedents of the prisoner before him, and then to pass sentence. Secondly, even if the Recorder had jurisdiction to consider the validity of the committal, the committal here was valid. The statute does not refer to proof of the prisoner's age as to a condition precedent to the right of the magistrates to commit, and in any event the age of the prisoner could properly be established by an admission made by him. [He referred to TURNER, 3 Cr. App. R. 103; [1910] 1 K. B. 346.] In MCCANN (1911), 6 Cr. App. R. 115, decided under the Prevention of Crime Act, 1908 (rep.), no proof of age had been offered, but it appeared to the Court that the appellant was over sixteen and under twenty-one, and this was held to be sufficient.

1951.
*Oct.* 24, 25.

REX *v.* RECORDER OF GRIMSBY, *Ex p.* PURSER.

Goddard, L.C.J., Slade, J., Devlin, J.

*T. R. Fitzwalter Butler*, for the respondent Middleton: There is no authority on the right of quarter sessions to inquire into the validity of a committal under section 20, but it has been held under the parallel section, section 29, that a Court of quarter sessions should refuse to adjudicate if it appears to the Court that the committal was invalid. [He referred to R. *v.* MIDDLESEX JUSTICES, *Ex p.* DIRECTOR OF PUBLIC PROSECUTIONS, 34 Cr. App. R. 112; [1950] 2 K. B. 589, and R. *v.* NORFOLK JUSTICES AND ANOTHER, *Ex p.* DIRECTOR OF PUBLIC PROSECUTIONS, 34 Cr. App. R. 120; [1950] 2 K. B. 558.] Although the method which the justices adopted in obtaining information as to the respondent's age was irregular, it may be that the committal proceedings would not have been invalidated on that account alone if they had been otherwise valid, but it is submitted that they were rendered invalid by reason of the fact that the magistrates heard no evidence on oath on any matter. Section 20 (3) of the Act requires that the magistrates shall be satisfied of the various matters enumerated in subsection (1), and the only manner in which they can properly be satisfied is by hearing evidence on oath about them.

*R. J. Parker*, for the Recorder.

THE LORD CHIEF JUSTICE: In this case Mr. Roberts moves for an order of *certiorari* to bring up and quash an order made by the learned Recorder of Grimsby directing that John Arthur Middleton should be discharged out of custody and for an order of *mandamus* directed to the learned Recorder to proceed to hear and determine under section 20 (5) of the Criminal Justice Act, 1948, what sentence he should pass upon Middleton, who had been committed to him by justices with a view to a sentence of Borstal training. The boy, who is said to be, and admitted that he was, over seventeen years of age, had pleaded Guilty at Grimsby Magistrates' Court to cycle stealing.

There is no statutory provision as to the procedure to be followed when, in a court of summary jurisdiction, an accused

person pleads Guilty. Some magistrates' Courts take evidence on oath; other magistrates' Courts do not think it necessary to do so and deal with a plea of Guilty in just the same way as does a Court of Assize or quarter sessions. Such Courts, where convictions are to be proved, put the officer who is proving convictions on oath, but, so far as the circumstances of the case are concerned, they simply hear a statement from counsel. In the absence of any statutory provision, I do not think it would be desirable for this Court to lay down any particular rule of practice to be observed by Courts of summary jurisdiction one way or the other. Often it may be desirable for the Court to hear some evidence on oath, but in the majority of cases, which often are very trivial, the Court does not think it necessary to hear more than the facts of the case stated informally. Of course, if the accused person says: "I do not agree that this is being stated correctly", then no doubt the justices would be well advised to have the informant sworn so that he can be, if necessary, cross-examined. But, in a case where no such question arises, I am certainly not prepared to say as a matter of practice that Courts of summary jurisdiction are bound to take evidence on oath where there is a plea of Guilty.

Does it make any difference here, where the justices are proposing to act under section 20 of the Criminal Justice Act, 1948, and commit the accused person to quarter sessions with a view to a Borstal sentence? Section 20 (3) provides: "If on the day of his conviction he is not less than sixteen but under twenty-one years of age, and the Court is satisfied of the matters mentioned in subsection (1) of this section, the Court may commit him in custody to quarter sessions for sentence in accordance with the following provisions of this section". Then there is a provision in subsection (4) as to what Court he is to go to, and, when he once gets to the Court for sentence, by subsection (5) the following provisions of subsection (3) shall have effect: "The appeal committee or Court of quarter sessions shall inquire into the circumstances of the case and may (i) if satisfied of the matters mentioned

1951.
*Oct.* 24, 25.

REX *v.* RECORDER OF GRIMSBY, *Ex p.* PURSER.

Goddard, L.C.J., Slade, J., Devlin, J.

in subsection (1) of this section, sentence him to Borstal training. . .". The matters about which they have to be satisfied, and are mentioned in subsection (1), are whether, having regard to his character and previous conduct and the circumstances of the offence, it is expedient that he should be sent to Borstal. The requirement of age is not one of the matters mentioned in subsection (1) of which the Court has to be satisfied, because the words of that subsection are: "if on the day of conviction he is not less than sixteen but under twenty-one years of age and the Court is satisfied, having regard to his character and previous conduct, etc."

The first objection made before the learned Recorder was that the committal was bad, because there had been no evidence before the magistrates' Court of the age of the prisoner. The prisoner admitted that his age was seventeen. What is the necessity of proving age, if the justices having heard a lad, who appears to be about seventeen, say that he is seventeen? He is admitting that he is over sixteen and that he is under twenty-one. Of course, justices may have to say in some particular case, "We are not satisfied about that admission; this person does not look to us to be seventeen"; or they may say, "This person looks to us to be over twenty-one; we will hear evidence about it". If justices see the person and upon ordinary observation and commonsense come to the conclusion that he is telling the truth about his age, I do not see that there is the least necessity to have formal evidence about it, because, if the person can admit that he is Guilty of the offence, I cannot see why he cannot admit that he is seventeen years of age. Besides that, in TURNER, 3 Cr. App. R. 103; [1910] 1 K. B. 346, the accused person, who was over a certain age, had been convicted and the Court said (at pp. 161 and 362 of the respective reports): "In order that a person may be found to be a habitual criminal"—and there is no difference between that case and this for this purpose, because it is simply a question of proof of age—"it is necessary that the jury should find on evidence that he has previously been convicted three times since he was sixteen

years of age. The jury must therefore return their verdict on evidence, but there may be cases in which no doubt can arise. For example, convictions against the prisoner, three in number, may be proved to have all taken place within the last year, and it may be perfectly obvious to everybody that the prisoner is very considerably over sixteen years of age at the time of the inquiry, and, therefore, must have been over sixteen when those convictions took place. There are, therefore, cases in which no difficulty can arise. But at least three previous convictions since the age of sixteen must be proved, and when the prisoner is of an age which makes it doubtful whether he may not have been under the age of sixteen at the date of the first conviction which is alleged against him, some further evidence is necessary; but the fact that the prisoner has stated at a particular time that he is a particular age would be sufficient. The statement of a prisoner's age in the Court calendar is generally derived from statements made by the prisoner himself. As I understand the practice, the Governor of the gaol is responsible for the calendar and the statement of the prisoner's age in the calendar is equivalent to a statement that the prisoner so gave his age, but in all cases where the jury would not be prepared to act upon their own view without evidence it must be proved. If the Governor or the gaoler were to give evidence to the effect that 'I cannot recollect whether I examined this man myself, but in the course of our regular procedure the man when he comes into gaol gives his age, and the age in the calendar was given to me as that which he stated it to be', I think that would be sufficient, because the official says that the age mentioned in the calendar is that which was reported to the prison authorities as the prisoner's age by the prisoner himself, and that kind of evidence would be sufficient; but in all cases where the prisoner's appearance is not sufficient to satisfy the jury some kind of evidence must be given".

Then there was the case of McCANN (1911), 6 Cr. App. R. 115, in which a lad was convicted at Preston Quarter Sessions, and the ground of his appeal to the Court of Criminal Appeal,

1951.
*Oct.* 24, 25.

REX *v.* RECORDER OF GRIMSBY, *Ex p.* PURSER.

Goddard, L.C.J., Slade, J., Devlin, J.

after he had been sentenced to Borstal detention, was that he was convicted on his twenty-first birthday and consequently was too old to be sent to a Borstal institution. No age had been given there, but the Court said (at p. 116): "By the Prevention of Crime Act, 1908, the appellant was liable to be sent to a Borstal institution if it appeared to the Court that he was not less than sixteen nor more than twenty-one years of age. In this case it did appear to the Court that he was not more than twenty-one years of age; the Court was informed that he was twenty and had no reason to doubt it". There was no evidence given in TURNER'S CASE (*supra*).

There are no words in section 20 (3) of the Act of 1948 which in any way affect the matter, because all that is provided is, "if on the day of his conviction he is not less than sixteen". The statute does not even provide that the Court has to be satisfied, either on a view of the prisoner or otherwise; it simply provides that if he is over sixteen and under twenty-one he may be committed for sentence. So far as age is concerned, I am clearly of opinion that there is nothing in the point which has been urged.

Mr. Butler has also urged that the committal is bad because he has been committed for sentence without the justices having taken evidence on oath. He has contended that they cannot be satisfied with regard to his character, previous conduct and the circumstances of the offence, without hearing some evidence on oath. Those are the very matters into which the Court of quarter sessions has to inquire. Is the Court of quarter sessions to inquire into the fact whether the justices below were satisfied about a certain matter? They have shown that they were satisfied by having committed for sentence. Subsection (5) provides that "Where an offender is so committed for sentence as aforesaid, the following provisions shall have effect, that is to say: (a) the appeal committee or Court of quarter sessions shall inquire into the circumstances of the case and may—(i) if satisfied of the matters mentioned in subsection (1) of this section, sentence him to Borstal training; or (ii) in any case, deal with him in any manner in which the

Court of summary jurisdiction might have dealt with him". Directly the respondent had been committed and was before the Recorder, and the Recorder had been shown the conviction and committal, it was for the Recorder to sentence him and to make up his mind whether, having regard to his character and previous conduct and circumstances of the case it was desirable that he should be sent to Borstal. That is the very thing the Court of quarter sessions has to do. I think, therefore, that it would be idle for quarter sessions to inquire what happened before the justices and why they were satisfied or how they were satisfied because, if quarter sessions are not satisfied it is a case for Borstal, they do not send the prisoner to Borstal. In the experience of anyone concerned with criminal law it is known that from time to time in some cases, although justices have committed to quarter sessions with a view to a sentence of Borstal training, quarter sessions have not infrequently refused to pass such a sentence; they have either made a further probation order or bound the offender over, or, in a bad case, have dealt with him by sending him to prison.

I should be exceedingly sorry to have to give effect to these contentions put forward on behalf of the respondent, because, if we had to do so, the position would be that no sentence would have been passed, and therefore we should have to hold that the case had not been concluded before the justices, exactly in the same way as was held in R. *v.* Middlesex Quarter Sessions, *Ex p.* Director of Public Prosecutions, 34 Cr. App. R.; [1950] 2 K. B. 589. It would mean that we should have to order the respondent to appear again before the justices, who then would either sentence him to imprisonment or would go through exactly the same procedure as they have gone through before, merely hearing the evidence of a police inspector repeated on oath instead of a mere statement. Then the respondent would have to go again into custody and remain in custody till quarter sessions could deal with him. I am very glad that it is not necessary to go through that

1951. *Oct.* 24, 25.

REX *v.* RECORDER OF GRIMSBY, *Ex p.* PURSER.

Goddard, L.C.J., Slade, J., Devlin, J.

procedure, because I think it would be an empty form and a very great hardship on the respondent.

In my opinion the Recorder had jurisdiction to sentence the respondent or to deal with him under subsection (5) of section 20. For these reasons the order discharging him from custody will be quashed. *Mandamus* will issue to the Recorder to deal with him.

SLADE, J.: I agree.

DEVLIN, J.: I agree.

*Orders for certiorari and mandamus.*

---

*Solicitors*: Hyde, Mahon & Pascall, agents for L. W. Heeler, Grimsby, for the appellant; Biddle, Thorne, Welsford & Barnes, agents for Hudson, Hart & Borrows, Richmond, Yorks, for the respondent, Middleton; Treasury Solicitor, for the Recorder.

---

BEFORE

MR. JUSTICE HILBERY, MR. JUSTICE SLADE AND MR. JUSTICE DEVLIN.

---

1951. *Nov.* 19.

## KENNETH JOHN BALL.

*Sentence—General Principles—Differentiation between Co-prisoner.*

Observations on the general principles on which sentences should be passed and the propriety of different treatment of two prisoners convicted of the same crime if the Court, in the public interest, thinks it right to make a distinction between them because of differences in their characters and antecedents.

Appeal against sentence.

The appellant pleaded Guilty at Cheshire Assizes on May 31, 1951, to three charges of burglary, and asked that five similar

1951.
*Nov.* 19.

KENNETH JOHN BALL.

Hilbery, J., Slade, J., Devlin, J.

offences should be taken into consideration and was sentenced by Stable, J., to five years' imprisonment.

The appellant, who was twenty-three years of age and had a bad record, was indicted with another prisoner aged twenty-nine, who also had a bad record, and who pleaded Guilty to the three burglaries charged in the indictment. In view of exceptional matters affecting the character of the co-prisoner, the Judge ordered him to be placed on probation for three years.

*J. R. Bickford-Smith*, for the appellant:

The sentence was too severe having regard to the age and antecedents of the appellant.

No counsel appeared for the Crown.

HILBERY, J. (after referring to the facts of the case): It appears to us appropriate that we should restate the principles which must guide a Court in deciding what is the right sentence to pass on a prisoner. In the first place, this Court does not alter a sentence which is the subject of an appeal merely because the members of the Court might have passed a different sentence. The trial Judge has seen the prisoner and heard his history and any witnesses to character he may have chosen to call. It is only when a sentence appears to err in principle that this Court will alter it. If a sentence is excessive or inadequate to such an extent as to satisfy this Court that when it was passed there was a failure to apply the right principles, then this Court will intervene.

In deciding the appropriate sentence a Court should always be guided by certain considerations. The first and foremost is the public interest. The criminal law is publicly enforced, not only with the object of punishing crime, but also in the hope of preventing it. A proper sentence, passed in public, serves the public interest in two ways. It may deter others who might be tempted to try crime as seeming to offer easy money on the supposition, that if the offender is caught and brought to justice, the punishment will be negligible. Such

1951.
*Nov.* 19.

KENNETH JOHN BALL.

Hilbery, J.,
Slade, J.,
Devlin, J.

a sentence may also deter the particular criminal from committing a crime again, or induce him to turn from a criminal to an honest life. The public interest is indeed served, and best served, if the offender is induced to turn from criminal ways to honest living. Our law does not, therefore, fix the sentence for a particular crime, but fixes a maximum sentence and leaves it to the Court to decide what is, within that maximum, the appropriate sentence for each criminal in the particular circumstances of each case. Not only in regard to each crime, but in regard to each criminal, the Court has the right and the duty to decide whether to be lenient or severe.

It is for these reasons, and with these purposes in view, that before passing sentence the Court hears evidence of the antecedents and character of every convicted person. It follows that when two persons are convicted together of a crime or series of crimes in which they have been acting in concert, it may be right, and very often is right, to discriminate between the two and to be lenient to the one and not to the other. The background, antecedents and character of the one and his whole bearing in Court may indicate a chance of reform if leniency is extended, whereas it may seem that only a harsh lesson is likely to make the other stop in his criminal career. The argument that a severe sentence on one prisoner must be unjust because his fellow prisoner, who was convicted of the same crime, received a light sentence or none at all, has neither validity nor force. The differentiation in treatment is justified if the Court, in considering the public interest, has regard to the differences in the characters and antecedents of the two convicted men and discriminates between them because of those differences.

[His Lordship went on to say that there were no grounds for interfering with the sentence and that the appeal must be dismissed.]

*Appeal dismissed.*

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HILBERY AND MR. JUSTICE BARRY.

## ALFRED GEORGE HALL.

1951. *Dec.* 10.

*Separate Trials—Discretion of Judge—Evidence on all Counts Admissible on Each One—Gross Indecency—Similar Acts—Evidence Justified as Tending to Rebut Defence—Defence of Medical Treatment in One Case—Issue of Identity in Another.*

Where the prosecution intend to adduce evidence of similar acts committed by the prisoner, the justification of the introduction of such evidence is that it is relevant to an issue raised by the prosecution or tends to rebut a defence otherwise open to, that is to say, intended to be relied on, by him, such as mistake, or accident, or innocent treatment or association. As soon as it has become clear that the defence is that the facts alleged by the prosecution have an innocent and not a guilty complexion, such evidence may be given, and it is none the less admissible because it shows, or tends to show, that the prisoner has been guilty of another offence. The *dictum* in SIMS (31 Cr. App. R. 158, at p. 167; [1946] K. B. 531, at p. 539) that such evidence is admissible on a charge of an unnatural offence irrespective of the issues raised by the defence is not to be followed, though otherwise the decision remains good law.

The appellant, who was not a medical man, was charged with committing acts of gross indecency with three young men, B., C. and R. The evidence of B. and C. was that they had met the appellant at an institution at which he was an instructor, that he had there spoken to them on homosexual matters, given them a particular kind of ointment, and subsequently handled them indecently on the pretext that he was giving them medical treatment. Then the evidence of R. was that he had heard the appellant deliver a pseudo-scientific lecture, and that the appellant had then spoken to him in a similar manner, given him the same ointment, and then indulged in indecency with him. The appellant had indicated that with regard to B. and C. he intended to raise the defence that he was giving them innocent medical treatment, and with regard to R. that he had never met him. The Judge at the trial

1951.
*Dec.* 10.

ALFRED GEORGE HALL.

Goddard, L.C.J., Hilbery, J., Barry, J.

refused to order separate trials of the group of counts relating to each of the three men, stating as his reason that the evidence on all the counts in the indictment would be admissible on any one count.

*Held*, that the ruling on admissibility of evidence was correct, as the evidence relating to B. would be admissible on any count relating to C., and *vice versa*, to rebut the defence of innocent medical treatment, and the evidence relating to B. and C. would be admissible on any count relating to R., and *vice versa*, on the issue of identity, although no actual defence of *alibi* had been raised, and that the Judge had properly exercised his discretion in refusing to order separate trials.

THOMPSON *v.* DIRECTOR OF PUBLIC PROSECUTIONS (13 Cr. App. R. 61; [1918] A. C. 221), explained.

Where a prisoner is charged with a series of indecent offences against children, whether boys or girls, the fact that they have all complained of the same sort of conduct on the part of the prisoner towards them shows that the interest which the prisoner was taking in them was not of a paternal or friendly or medical nature, but was for the purpose of gratifying lust, and on the charge of an offence against any one child the evidence of similar conduct towards the other children is admissible to rebut a defence of innocent association, and in such circumstances it would be proper to try the charges together.

SIMS (31 Cr. App. R. 158, at p. 169; [1946] K. B. 531, at p. 540), followed on this point.

Appeal against conviction.

The appellant was convicted at the Central Criminal Court on June 1, 1951, of gross indecency with male persons and was sentenced by Lynskey, J., to consecutive terms of eighteen months', two years', and eighteen months' imprisonment—five years in all.

The indictment contained ten counts and the appellant was convicted on eight counts, three of which related to a young man named Chapman, four to a young man named Bowden, and one to a young man named Ritchie. The appellant, who was not a medical man, was an instructor at an institution in London connected with the study of the occult and similar matters. The evidence of Chapman and Bowden was that they

1951.
*Dec.* 10.

ALFRED GEORGE HALL.

Goddard, L.C.J., Hilbery, J., Barry, J.

had met the defendant there, and that he had spoken to them on homosexual matters, and advised a course of manipulative treatment, that he supplied a tube of a particular kind of ointment, and that he had subsequently committed grossly indecent acts of a similar nature with them on various occasions. The defence to these charges was that anything done to the young men by the appellant had been done in the course of *bona fide* medical treatment, and with regard to Bowden the appellant further suggested that the allegations were made by way of revenge, because Bowden had been dismissed from a post at the institute. The evidence of Ritchie was that he heard the appellant deliver a lecture of a scientific or pseudo-scientific nature at Bournemouth, that the appellant had then spoken to him on sexual matters, provided him with a tube of the same kind of ointment, and then committed indecencies and suggested further indecencies with him. To that charge the defence was a denial that the appellant had ever met Ritchie.

An application was made by the defence for separate trials of the group of counts relating to each of the three men, but Lynskey, J., ruled that the evidence on all the counts would be admissible on any one count, and refused to accede to the application.

*E. V. Falk*, for the appellant:

Lynskey, J., should have ordered separate trials of the group of counts relating to each of the men concerned. The multiplicity of charges created undue prejudice and made a fair trial impossible. This case differs from SIMS (31 Cr. App. R. 158; [1946] K. B. 531) in that in this case the indictment contained ten counts, and evidence was further given of twelve other offences which were not the subject of any charge. It is submitted that some of the *dicta* in SIMS' CASE (*supra*), especially the *dictum* that in a case of this kind evidence of similar acts is admissible irrespective of the issues raised by the defence, are unsound. They have been regarded as unsound by the Judicial Committee of the Privy Council in NOOR MOHAMED

1951.
*Dec.* 10.

ALFRED GEORGE HALL.

Goddard, L.C.J., Hilbery, J., Barry, J.

*v.* R., [1949] A. C. 182. When a Court has to consider an application for a separate trial, in deciding whether evidence on one count is admissible on another, the Court should consider this question: is the evidence admissible to rebut a defence of accident, mistake, innocent intent or *alibi*? : MAKIN *v.* ATT.-GEN. FOR NEW SOUTH WALES ([1894] A. C. 57); THOMPSON *v.* DIRECTOR OF PUBLIC PROSECUTIONS (13 Cr. App. R. 61; [1918] A. C. 221). The words in MAKIN'S CASE (*supra*) " or any other defence otherwise open to the accused " have subsequently been judicially defined, particularly in THOMPSON'S CASE (*supra*), and do not include the defence of mere denial; otherwise the prejudicial evidence would always be admissible. In this case there were four sets of counts relating to four different men. With regard to the last set the appellant was acquitted. The defences with regard to the other three men were completely different. In the case of Bowden, the contention of the appellant was that Bowden had been dismissed from his post at the institute at which the appellant was an instructor, and made lying accusations against the appellant as part of a conspiracy against him in revenge, and that nothing at all had taken place with regard to Bowden on the occasions which were the subject-matter of the counts in the indictment. With regard to Chapman the defence was that anything done to him by the appellant was done in the course of genuine medical treatment. In the case of Ritchie the defence was that the appellant had never seen him before his appearance at the magistrates' court, and that Ritchie was a convicted housebreaker. In the cases of Bowden and Ritchie, evidence on other counts and of offences not charged in the indictment was inadmissible in that it did no more than tend to show that the appellant was a person likely, from his criminal conduct or character, to have committed the offences for which he was being tried, and it did not go to rebut any of the defences which make the evidence admissible.

The course followed in this case made a fair trial for the appellant impossible. " It is so easy to derive from a series of unsatisfactory accusations, if there are enough of them, an

1951.
*Dec.* 10.

ALFRED GEORGE HALL.

Goddard, L.C.J., Hilbery, J., Barry, J.

accusation which at least appears satisfactory": BAILEY (18 Cr. App. R. 42; [1924] 2 K. B. 300, at p. 305). Here there is a mass of evidence concerning twenty-two offences and inevitably a damning prejudice must have been created, no matter how carefully the Judge warned the jury to consider the matter.

In the case of Ritchie the Judge further misdirected the jury on the necessity for corroboration. He dealt with the question generally, and told the jury that admissions by the appellant could afford corroboration. There was no admission in respect of Ritchie, and admissions in the case of Chapman could not corroborate Ritchie's evidence.

*R. E. Seaton*, for the Crown:

The question of separate trials was one solely for the Judge's discretion. The Judge's ruling that evidence on the whole indictment was admissible on any one count was correct in law. Even if the decision in SIMS' CASE (*supra*) be regarded as having gone in some respects too far, it is clearly good law in so far as it adopted the principle laid down in MAKIN'S CASE (*supra*) that evidence of this kind is admissible to rebut a defence which would otherwise be open to the accused and was in fact relied on by him. On this principle, the evidence of acts by the appellant in relation to Chapman was admissible on any count relating to Bowden, and *vice versa*, because the appellant had clearly set up the defence that his association with both men was an innocent one and that any handling of them by him was done in the course of *bona fide* medical treatment. There was a clear *nexus* between these two cases. The case of Ritchie is somewhat more difficult, because there the defence was a denial of any association at all; but as in THOMPSON'S CASE (*supra*), identity was in issue, and on that ground the conduct of the appellant towards Bowden and Chapman was admissible on the count relating to Ritchie, and *vice versa*.

*E. V. Falk*, replied.

1951.
*Dec.* 10.

ALFRED GEORGE HALL.

Goddard, L.C.J., Hilbery, J., Barry, J.

THE LORD CHIEF JUSTICE: The appellant was tried and convicted before Lynskey, J., at the Central Criminal Court on eight counts of an indictment containing ten counts. The charge in each count was gross indecency, and three different young men were involved. At the outset of the case an application was made to the learned Judge to order separate trials of the groups of counts relating to each young man.

That the indictment was good in form and complied with section 4 of the Indictments Act, 1915, which enables any number of misdemeanours to be joined in the same indictment, there can be no doubt. That section of the Indictments Act was made the subject of rules, and rule 3 of the rules provides: "Charges for any offences, whether felonies or misdemeanours, may be joined in the same indictment if those charges are founded on the same facts or form or are part of a series of offences of the same or a similar character". Therefore, ever since the Indictments Act became law, on January 1, 1916, it has been permissible to include a number of misdemeanours and, indeed, felonies, in one indictment, and the test whether they are to be included is whether the charges "are founded on the same facts or form or are part of a series of offences of the same or a similar character". As to that, there is no doubt in this case that not only were the facts upon which the charges were founded of the same or similar character, but were of a startlingly similar character, so much so that each of the three men deposed to similar indecencies of the most revolting character that can be imagined. There was, therefore, nothing wrong with the indictment.

That being so, it became a matter of discretion in the learned Judge whether he would allow the charges to be tried together, or whether he would order separate trials. That is a discretion which this Court has said on more than one occasion it would not overrule unless compelled to do so by some overwhelming fact. Of course, if the learned Judge or a recorder or a chairman gives a reason which obviously was a bad reason, the Court may review his decision, although it is not certain that it would if it were of opinion that in all

1951.
*Dec.* 10.

ALFRED GEORGE HALL.

Goddard, L.C.J., Hilbery, J., Barry, J.

the circumstances the charges might well have been tried together, though the reason given by the Judge was wrong.

In this case Lynskey, J., gave as his reason, that he was of opinion that all the witnesses to be called on all the counts could have been called on any one of the counts. That was because he had seen from the conduct of the case when it was before the examining magistrate what was the nature of the defence. Even if he had said that he would wait to see, before giving a decision, how the case went, directly there had been cross-examination of the first witness in this case, it would have been quite obvious what the defence was going to be.

The appellant was in fact attached to some sort of society, or an institution, with the name or suggestion that it is concerned with the occult and a few other things. Apparently young men used to go to this institution, whether for the purpose of studying the occult or not I do not know. In one case a man named Chapman said he was sent by his mother because his hair was falling out. Directly he got there, the appellant, according to the evidence, began to talk to him about filthy homosexual matters and to suggest he needed treatment for homosexual matters, and began to handle his penis and do other things as well which I refrain from mentioning because they are of such a disgusting character. On the other hand, the appellant said: "I am a Doctor of Laws, a Doctor of Philosophy and a Doctor of Theology". I suppose he was a doctor of every liberal class of learning in the world except medicine, and here was he at this institution masquerading as a medical man; I say "masquerading" deliberately, because that is what the jury mean by their verdict, and anybody who had the misfortune to read this case could come to no other conclusion. Here he was at this place pretending to give medical treatment to young men who were frigid, and who apparently did not think they could get the full benefit of their sexual glands. In fact he is one of those most pernicious rogues and quacks who make a practice of this sort of thing for the purpose of gratifying their lust. He was one of the professors or teachers at this institution. It is

1951. *Dec.* 10.

ALFRED GEORGE HALL.

Goddard, L.C.J., Hilbery, J., Barry, J.

perhaps only fair to the institution to say that they seem to have got rid of him. When one finds that he has been sentenced in Canada before he came here for this class of offence one wonders what care this institution takes to see whom it is accepting on its staff; in fact, I should think some observation may be kept on this institution.

There was further evidence given by another man named Bowden; in fact, it was his case that was first dealt with by the learned Judge. He was a young man who went there, and apparently from the time when he went there the appellant began to talk to him about homosexual matters, and from the events that happened it is quite obvious why; he was wanting to get the young man into a state of mind in which he would let him indulge in unnatural practices upon him. Having done that, he then invited the young man to his home, got him into his bedroom and then, according to the young man, the first of the indecent acts took place, though it was not the first charged in the indictment. The first charge that was made in the indictment in respect of Bowden was that the appellant asked him to go down to Bournemouth for a holiday. He took him down to Bournemouth for a weekend and went presumably to a respectable hotel and, for the sake of economy, so it was said, they slept in the same room and in the same bed. Does not that throw a glaring light on what the appellant has been doing the whole time?

Then there was a third and rather different case. The appellant, having transferred his nefarious practice to Bournemouth, met another man there named Ritchie, a man of the sort of character that can be judged from the fact that he is now serving a sentence of corrective training. In fact he had gone down there for the purpose of housebreaking. He came forward and said that the appellant did, or suggested, exactly the same thing to him, having first given a lecture in which again he was posing as a psychiatrist or something of that sort. There was not the smallest ground for suggesting that this man had seen the other two men before, yet he produced what the appellant had given him, a tube or case of ointment bearing

1951.
*Dec.* 10.

ALFRED GEORGE HALL.

Goddard, L.C.J., Hilbery, J., Barry, J.

a very suggestive name, which the appellant told him to use and, I think, used on him himself, rubbing his parts.

It is said that the provisions in the Indictments Act and rules made thereunder by which charges can be included in one indictment and tried together are always subject to the principle that the learned Judge ought, if the evidence on one count is not admissible on the other counts and is of a highly prejudicial character, to refuse to try all the counts together and should try them one by one. Mr. Falk, who has conducted a difficult case with great propriety and brought everything before us that can be brought forward in the interests of his client, desired to challenge the ruling in SIMS (31 Cr. App. R. 158; [1946] K. B. 531), in which this Court, a Court of five Judges, decided that the counts could all be tried together.

The real ground on which in SIMS' CASE (*supra*) it was decided that all the charges could be tried together was this: That case, as was this one, was concerned with homosexual offences, mainly in that case buggery; there were several young farm labourers with whom the prisoner, an elderly man, was alleged to have committed the offence of buggery. The Court in effect said that it was right of the Judge to try all the four cases together, because the fact was that all the men, who admittedly had gone to the prisoner's house to spend the evening on different occasions, said that exactly the same advances had been made to them by the prisoner and exactly the same acts had been committed on them, which tended to show that the association of the prisoner with these men was a guilty and not an innocent one. His defence in that case, if I remember aright, was that he used to invite the young men in to have a game of cards and sit with him in his cottage. The answer the prosecution made was that, "although you say AB. came to you innocently whereas he says you committed these filthy offences on him, exactly the same happened in the case of CD., who you say came innocently, and exactly the same in the case of EF.". On those grounds the Court held that the evidence was admissible.

1951.
*Dec.* 10.

ALFRED GEORGE HALL.

Goddard, L.C.J., Hilbery, J., Barry, J.

In the course of a rather long judgment two lines of approach were suggested, and I think it should be taken, in view of a criticism of the judgment by the Judicial Committee of the Privy Council in NOOR MOHAMED *v.* R. ([1949] A. C. 182), not criticism, be it noted, of the decision but of a passage in the judgment, that that judgment went too far. Giving the judgment of the Court, I said (31 Cr. App. R., at p. 167; [1946] K. B., at p. 539): "It has often been said that the admissibility of evidence of this kind depends on the nature of the defence raised by the accused: see, for instance, the observations of Lord Sumner in THOMPSON *v.* DIRECTOR OF PUBLIC PROSECUTIONS (13 Cr. App. R. 61, at p. 78; [1918] A. C. 221, at p. 232), and of this Court in COLE ( (1941), 28 Cr. App. R. 143). We think that that view is the result of a different approach to the subject. If one starts with the assumption that all evidence tending to show a disposition towards a particular crime must be excluded unless justified, then the justification of evidence of this kind is that it tends to rebut a defence otherwise open to the accused; but if one starts with the general proposition that all evidence that is logically probative is admissible unless excluded, then evidence of this kind does not have to seek a justification but is admissible irrespective of the issues raised by the defence, and this we think is the correct view". That passage their Lordships in the Judicial Committee commented upon and thought that the second proposition was not correct and that the first proposition was correct. Therefore one views this matter on the footing "If one starts with the assumption that all evidence tending to show a disposition towards a particular crime must be excluded unless justified, then the justification of evidence of this kind is that it tends to rebut a defence otherwise open to the accused".

One objection taken in this case is that that would be tantamount to saying in every case where the prisoner pleads Not Guilty the evidence must be open. I do not think that is right; and Lord Sumner in THOMPSON *v.* DIRECTOR OF PUBLIC PROSECUTIONS (*supra*) said it was not. In criminal cases, with

very few and immaterial exceptions, with which I need not deal, the prisoner does not plead in writing; he merely pleads orally, and a plea of Not Guilty is a plea to the general issue. As soon as the general issue is pleaded, all defences are open. It would not, therefore, be right at once in all cases to assume that a prisoner is going to set up a particular defence, but he may have shown perfectly clearly, by what he has said at the time of arrest or by the conduct of his case at the magistrates' court, the defence which he is going to raise; or it may be that some particular defence does not emerge until some cross-examination takes place in the Court of trial, from which it can be seen that the prisoner is going to set up the defence of mistake or accident, or, as in this case, innocent treatment instead of filthy manipulation. As soon as it becomes clear that the prisoner's defence is that the facts alleged by the prosecution have an innocent and not a guilty complexion, then evidence may be given which otherwise might be inadmissible; and it is not the less admissible because it shows, or tends to show, that the prisoner has been guilty of another offence. That was made quite clear in THOMPSON *v.* DIRECTOR OF PUBLIC PROSECUTIONS (*supra*).

The learned Judge in this case reminded the jury that, when they were considering a matter of this sort, they would remember that if the appellant was genuinely doing the acts in question with a view to giving medical advice, even if he was not a qualified medical man, that would be a defence, because he would not be doing them with an indecent mind and they would cease to be indecent acts. He reminded the jury of the examination of female or male patients which a medical man has frequently to make, in which, of course, he has, for the purpose of diagnosis and advice, to examine his patients in a way which, if it were done by a layman, simply for the purpose of gratifying his lust, would be conduct of the most heinous and serious description. Of course, there have been many cases in the Courts where a man, under the pretence of giving a young woman medical advice, has indecently assaulted her and, indeed, in some cases, raped her, because he has induced

1951.
*Dec.* 10.

ALFRED GEORGE HALL.

Goddard, L.C.J., Hilbery, J., Barry, J.

her to consent to the sexual act under the belief that she was receiving treatment. Therefore, this matter was dealt with, in our opinion, in a perfectly proper way. The reasons given by the learned Judge were perfectly right and the evidence was clearly admissible. When Bowden gave evidence of the suggestion made to him about medical treatment and so forth, it surely was material to show that the intention of the appellant was filthy and lustful and that he was doing almost the same thing in the case of Chapman.

The only case which for a moment gave the Court concern was that of Ritchie, because there the appellant's defence was: "I have never seen Ritchie before in my life". He did not say in the case of Ritchie that he was giving him medical treatment; he simply said he had never seen him before. Surely, then, the evidence of the other men became material on the very ground on which the House of Lords upheld the admission of evidence in THOMPSON'S CASE (*supra*), because it went to identity. The expression "identity" means that the evidence goes to show that the witness for the prosecution is speaking the truth when he says, "That is the man who did these indecent things to me", because the evidence of the other men shows that the prisoner is a man addicted to unnatural practices. That, as is pointed out by Lord Sumner in the well-known and constantly cited passage, was what justified the evidence with regard to Ritchie in this case. It was open to the jury to say that Ritchie was a liar, but the jury obviously accepted his evidence and, if they accepted his evidence, they were surely entitled to take into account the evidence which Chapman and Bowden had given, because Ritchie said that he first came across the appellant when he was giving one of his pseudo-scientific lectures at Bournemouth. As a matter of fact Ritchie had gone down there, not for the purpose of indulging in vice of this description, but for the comparatively minor activity of housebreaking, for which he is now undergoing a sentence of corrective training. I dare say he would be what is called in his own language a perfectly respectable housebreaker, but he got

into touch with the appellant and he told the jury that the appellant talked to him in exactly the same way as he did to the other men and offered him the same stuff to use as he had offered to the other people. That tends to show that he was the man whom Ritchie said performed these disgusting acts on him, and I cannot see that it makes any difference that in THOMPSON'S CASE (*supra*) the defence was an *alibi*, which simply means, " I am not the man; it was somebody else who committed the offence ", whereas the appellant says, without saying that he was not there at all, " I have never seen the man before in my life ". There was a flat denial that he was engaged in these practices, and whether it was because he was not in the town or because, being in the town, he had never seen the man, seems to me not to matter in the least. He was giving the same flat denial to Ritchie's evidence as was given in THOMPSON'S CASE (*supra*), and the House of Lords held that the evidence was admissible on grounds which I hope I have fully indicated.

I have only one other word to say and that is that in future it would, in our opinion, be desirable that a Court which has to deal with a case of this kind should remember the criticism which was passed on SIMS' CASE (*supra*) by the Judicial Committee was passed on one passage only in a very long judgment, and remember that no Court has yet thrown any doubt upon this passage in SIMS' CASE (31 Cr. App. R., at p. 169; [1946] K. B., at p. 540), which I think really sums up the matter: " In this case the matter can be put in another and very simple way. The visits of the men to the prisoner's house were either for a guilty or an innocent purpose: that they all speak to the commission of the same class of acts upon them tends to show that in each case the visits were for the former and not the latter purpose. The same considerations would apply to a case where a man is charged with a series of indecent offences against children, whether boys or girls: that they all complain of the same sort of conduct shows that the interest the prisoner was taking in them was not of a paternal or friendly nature but for the purpose of satisfying

1951. *Dec.* 10.

ALFRED GEORGE HALL.

Goddard, L.C.J., Hilbery, J., Barry, J.

lust ". To the words " paternal or friendly nature " one could add " or medical nature ".

This appeal is dismissed.

*Appeal dismissed.*

*Solicitors:* Pollard, Stallabrass & George Martin, for the appellant.

---

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE HILBERY AND MR. JUSTICE BARRY.

1951. *Dec.* 11.

## BASIL PIPE TURNER BURROWS.

*Indecent Assault on Male — Gross Indecency — Invitation by Prisoner to Boy to Handle Him Indecently—Criminal Law Amendment Act*, 1885 (48 & 49 *Vict. c.* 69), *s.* 11.

The appellant was charged with indecent assault on a boy. The evidence of the boy was that the appellant exposed himself to him and asked the boy to masturbate him. The boy further said that the appellant did attempt to touch his (the boy's) private parts. The Recorder directed the jury that the question for them to consider was whether the appellant had done either of the things alleged by the boy, and the jury convicted the appellant of indecent assault.

*Held*, that the direction was wrong in law, as the former act could not amount to an indecent assault, because there had been no threat or hostile act by the appellant towards the boy, and consequently no assault, and that on that ground the conviction must be quashed.

FAIRCLOUGH *v.* WHIPP (*ante*, p. 138), followed.

In such a case, where indecent assault may be difficult or impossible to prove, because no threat or hostile act by the prisoner towards the boy can easily be established, the proper charge is that of procuring, or attempting to procure (as the

case may be), an act of gross indecency with the prisoner himself.

PEARCE (*ante*, p. 17), referred to.

1951.
*Dec.* 11.

BASIL PIPE TURNER BURROWS.

Goddard, L.C.J., Hilbery, J., Barry, J.

Appeal against conviction.

The appellant was convicted at Ipswich Borough Sessions of indecent assault on a boy and was sentenced by the Recorder to six months' imprisonment.

The evidence of the boy was that the appellant exposed himself to him and asked the boy to masturbate him, and also that the appellant attempted to touch his (the boy's) private parts. The Recorder, having first directed the jury that unless they were satisfied that the appellant tried to get at the boy's private parts, the appellant was entitled to be acquitted, subsequently told them that the question for them to consider was whether the appellant had done either of the things alleged by the boy.

*W. H. Hughes*, for the appellant:

The latter direction of the Recorder was wrong in law and cannot be reconciled with FAIRCLOUGH *v.* WHIPP (*ante*, p. 138).

*L. Jellinek*, for the Crown:

It is conceded that the direction of the Recorder on the last matter was incorrect, and it is submitted that, so far as the first matter is concerned, a charge of gross indecency would have been more appropriate. There was, however, evidence of a hostile act, and accordingly of assault, so far as the second matter is concerned, and the jury may have had this in mind in arriving at their verdict.

THE LORD CHIEF JUSTICE: In quashing this conviction, as the Court with great reluctance feels bound to do, we desire to emphasise that we are not quashing it on the ground that we have any doubt that the appellant committed an offence. He is a disgusting man and he has been guilty of an offence against a small boy.

The difficulty in the case is that he was charged with an

1951.
*Dec.* 11.

BASIL PIPE TURNER BURROWS.

Goddard, L.C.J., Hilbery, J., Barry, J.

indecent assault and the evidence of the young boy was that the appellant came to him and exposed himself to him and told the boy to " rub him off ". The boy also said that the appellant did make an attempt to get at his (the boy's) private parts.

The Divisional Court has held in FAIRCLOUGH *v.* WHIPP (*ante*, p. 138), that an invitation to a child to touch a person indecently cannot be said to be an indecent assault because there was no hostile act towards the child, and, unless there is a hostile act, there cannot be an assault. It might be a very good thing if Parliament altered the law and made it an offence to invite a child to do an indecent act with a grown person.

In this particular case we desire to emphasise that the appellant ought to have been charged with an act of gross indecency with the boy, because if he got the boy, as he did, to manipulate his (the appellant's) private parts, he was guilty of an act of gross indecency. We have already, in the Court of Criminal Appeal in PEARCE (*ante*, p. 17; [1951] W. N. 129), exploded the view that one person cannot be charged with an act of gross indecency if the other cannot be charged, and, of course, in this case the boy could not be charged because he was an unwilling participator and was only a child. If the appellant had been charged with an act of gross indecency, he would, no doubt, have been very properly convicted. He was, however, charged with an indecent assault, and the learned Recorder, not having the advantage at that time of the decision of the Divisional Court in FAIRCLOUGH *v.* WHIPP (*supra*), gave the jury a direction which this Court finds a difficulty in upholding. He did tell the jury at one time: " Unless you are satisfied that the prisoner made an attempt to get to the boy's private parts he is entitled to be acquitted ", but he unfortunately also told them later on: " The question for you is, did he or did he not do either of these main things which are alleged against him by the prosecution, namely, get out his private parts for the boy to ' wank him off ', or himself try to get at the boy's private parts? ". In view of the

1951.
*Dec.* 11.

BASIL PIPE TURNER BURROWS.

Goddard, L.C.J., Hilbery, J., Barry, J.

decision in FAIRCLOUGH *v.* WHIPP (*supra*), that was not a proper direction, because if he only invited the boy to wank him off, as he put it, and did not in any way threaten the boy or commit a hostile act against the boy, that did not amount in law to an indecent assault. What the appellant ought to have been charged with was procuring an act of gross indecency with himself.

In the circumstances the Court feels obliged in this case to quash the conviction, but the case may be of some use if it is pointed out to prosecuting authorities generally that in a case of this description, where the prisoner and a boy are concerned, it is far safer to charge the prisoner with procuring or attempting to procure an act of gross indecency, and not to charge an indecent assault.

*Conviction quashed.*

---

*Solicitors :* Gotelee & Goldsmith, Ipswich, for the Crown.

---

## CIRCUIT CASE (NORTH-EASTERN CIRCUIT). LEEDS AUTUMN ASSIZES.

BEFORE

MR. JUSTICE ORMEROD.

---

### REX *v.* BLANCHARD.

1951.
*Dec.* 7, 10.

*Evidence — Competency — Spouse — Charge against Husband of Buggery with Wife.*

On a charge against a husband of buggery with his wife, the wife is a competent and compellable witness.

1951.
*Dec.* 7, 10.

REX *v.* BLANCHARD.

Ormerod, J.

Trial before Ormerod, J., at Leeds Assizes.

The defendant, Ernest William Blanchard, was charged with committing buggery with his wife, Violet Blanchard, in September, 1951. The wife was called as a witness for the prosecution, but counsel for the defence objected that she was not a competent witness. Ormerod, J., overruled the objection.

*G. De P. Veale, K.C.*, and *J. S. Taylor*, for the Crown.
*A. W. Stephenson*, for the defendant.

ORMEROD, J.: The defendant is indicted for committing an unnatural offence on his wife. Counsel for the defendant submits that the wife is not a competent witness against her husband on this charge. He submits that it is a well-established principle at common law that the spouse of a prisoner is not a competent witness against him. There have been certain statutory exceptions to the rule which are set out in *Archbold's Criminal Pleadings, etc.*, 32nd ed., at p. 477, and none of which affects this case. There are, in addition, certain other common law exceptions to the rule, one well-established exception being where the husband is indicted for personal injury to the wife, and *vice versa*. The question which I have to decide here is whether, where the husband is accused of the buggery with his wife, the offence comes within the exception. I am satisfied that it does.

It was held by Birkett, J., in LEARY ( (1942), Leeds Winter Assizes (unreported) ), that in a case of this kind the wife is a competent witness against her husband, but in my view the principle was established long before that. The reason for the exception is that in cases where violence is offered by one spouse to another it must frequently be offered to the only person able to give evidence against the prisoner as the injured party. If such party were not a competent witness, clearly the ends of justice would be defeated. That in itself would, in my opinion, be sufficient reason for including an offence of this kind within the exception, but the matter goes further than

1951.
*Dec.* 7, 10.

REX *v.* BLANCHARD.

Ormerod, J.

that. Cases of personal injury within the exception have been defined as cases which affect the person or liberty of the spouse who is being called to give evidence. I find it impossible to hold that a charge of this kind, which is certainly an offence against the person of the spouse, can be regarded as anything other than a case affecting the person of, although not necessarily the liberty of, the spouse. In these circumstances I am satisfied that the wife is competent to give evidence on this charge.

*Verdict—Not Guilty.*

*Solicitors:* E. H. Bullock, Town Clerk, Hull, for the Crown; Payne & Payne, Hull, for the defendant.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE BYRNE AND MR. JUSTICE PARKER.

## FRANK HERBERT HARRIS.*

1952.
*Jan.* 21 *&* 29.

*Separate Trials—Officebreaking—Police Officer on Duty—Evidence on Whole Indictment Admissible on any One Count—Nature of Defence—Presence on Last Occasion Alleged to be Matter of Coincidence—Rebuttal of Appearance of Innocence which Unexplained Facts Might Wear.*

The appellant, a police officer, was indicted on an indictment containing eight counts, all of which charged him with officebreaking and larceny at the same premises. The evidence disclosed in the depositions with regard to the last count was that, after a burglar alarm had rung at the premises, two detectives had seen the appellant at the end of a narrow passage near the premises, that when they waved to him he took no notice of them, that a few moments later he arrived at the premises, looking pale and agitated, having passed a coal-bin in which the stolen property was subsequently found.

* A fiat for leave to appeal to the House of Lords has been granted by the Attorney-General in this case. The appeal was heard on March 10, 11 & 13. On March 13 the House received the report of the Appeal Committee recommending that the appeal should be allowed and adjourned for further consideration.

1952.
*Jan.* 21 & 29.

FRANK HERBERT HARRIS.

Goddard, L.C.J., Byrne, J., Parker, J.

With regard to the first seven counts the evidence did not disclose the appellant's presence at or near the premises, but showed that he was on duty in the neighbouring market on every occasion, that neither he nor any other officer on duty had seen anyone who might have been the thief, and that each of the offences displayed certain similar features. The appellant's defence with regard to the eighth count was that his presence at the place where he was seen was a coincidence due to the course of a patrol which it was his duty to perform. The Judge refused to accede to an application by the defence for the separate trial of the eighth count, holding that the evidence on the whole indictment would be admissible on any one count.

*Held*, that the evidence relating to the first seven counts was admissible on the eighth count to rebut the appearance of innocence which, unexplained, the facts might wear, and that the Judge had properly exercised his discretion in refusing to order a separate trial.

HALL (*ante*, p. 167, followed).

Appeal against conviction.

The appellant, a police officer, was convicted at Leeds Assizes on November 13, 1951, of officebreaking and larceny and was sentenced by Pearson, J., to twelve months' imprisonment.

The indictment contained eight counts for officebreaking and larceny at the same premises, and the appellant was convicted on the last count only. All the offences disclosed certain features of similarity, particulars of which appear in the judgment. With regard to the first seven counts there was no direct evidence that the appellant had been at or near the premises, beyond the fact that he had been on duty on each occasion in the neighbouring market, but there was no evidence that either he or any other officer had seen anyone who might have been the thief. With regard to the last count the evidence was that, after a burglar alarm at the premises had rung, the appellant was seen by two detectives at the end of a passage near the premises, that he took no notice of them when they waved to him, and that a few moments later the appellant arrived at the premises, looking pale and agitated, having passed a coal-bin in which the stolen property was

1952.
*Jan.* 21 & 29.

FRANK HERBERT HARRIS.

Goddard, L.C.J., Byrne, J., Parker, J.

subsequently found. An application was made by the defence to Pearson, J., to order that the eighth count be tried separately and before the others, but the Judge declined to order a separate trial, holding that the evidence on the whole indictment would be admissible on any one count.

*H. Burton, K.C.*, and *R. Lyons*, for the appellant:

There was no evidence in the depositions relating to the first seven counts connecting the appellant with any offence; at the most the evidence did not go beyond that of opportunity. The only count in which there was evidence against the appellant was the eighth count. It was therefore widely prejudicial to the appellant to order that all the counts should be tried together. The case is quite different from that of HALL (*ante*, p. 167), where evidence of similiar offences was held admissible to rebut a defence of innocent association. Here no such defence was raised. Further, the Judge failed to direct the jury that they must consider each count separately.

*J. S. Snowden* and *Norman G. Black*, for the Crown:

The question was one for the exercise of the Judge's discretion. The Judge rightly held that the evidence on the first seven counts was relevant to the eighth count. It was relevant on two grounds—to rebut the defence of accident, the appellant having stated that his presence near the premises on the occasion of the last offence was due to coincidence, and also because it went to identity. [He referred to HALL (*supra*) and THOMPSON *v.* DIRECTOR OF PUBLIC PROSECUTIONS (13 Cr. App. R. 61; [1918] A. C. 221).]

*Cur. adv. vult.*

*Jan.* 29. The judgment of the Court was read by:

THE LORD CHIEF JUSTICE: The appellant was charged before Pearson, J., at the last assizes for the West Riding of Yorkshire on an indictment containing seven counts, all for officebreaking at the offices of G. Hill & Son (Bradford), Ltd., and stealing various sums of money, their property. The

1952.
*Jan.* 21 & 29.

FRANK HERBERT HARRIS.

Goddard, L.C.J., Byrne, J., Parker, J.

counts charged offences on or between different dates in May, June and July, 1951, the first count alleging a breaking and theft on a date between April 27 and May 2, and the eighth and last count a like offence on July 22. The appellant was acquitted by the jury on the first seven counts and convicted on the eighth. On arraignment and before the prisoner pleaded, an application was made to the learned Judge for a separate trial on the eighth count, and that that count should be first tried. Counsel submitted that the depositions disclosed no case in respect of the first seven counts and contended it would, therefore, be prejudicial to the defendant to open those counts against him when there was only one count in which there was evidence which could be left to the jury. Section 5 (3) of the Indictments Act, 1915, provides: " Where, before trial, or at any stage of a trial the Court is of opinion that a person accused may be prejudiced or embarrassed in his defence by reason of being charged with more than one offence in the same indictment, or that for any other reason it is desirable to direct that the person charged should be tried separately for any one or more offences charged in an indictment, the Court may order a separate trial of any count or counts of such indictment ". The learned Judge refused the application on two grounds. First, that the charges could all properly be included in one indictment under Rule 3 of the Rules made under the Act which provides for the joinder of charges which are founded on the same facts, or form or are part of a series of offences of the same or similar character and magnitude. He said that, in his opinion, the accused would not be embarrassed or prejudiced by the trial of all eight counts together, and that he was not satisfied that there was any reason for the trial of the eighth count separately.

The first ground given by the learned Judge is plainly right and is not attacked. It is the second ground that forms the subject of this appeal, as it was contended that this was a wrong exercise of the Judge's discretion and that prejudice must have been caused to the defendant. It is clear that the ground of the learned Judge's decision in this matter was that

all the evidence appearing on the depositions would be admissible on all or any of the counts, and if it was so admissible, no exception can be taken to the ruling. The case would be exactly similar to the recent case of HALL (*ante*, p. 167) decided in this Court on December 10, 1951.

In order to appreciate the matter, it will be well to set out the facts proved at the trial, all of which appeared in substance on the depositions on which the Judge based his decision. Succinctly stated, they were that Hill & Son occupied premises in Bradford Market, which is an enclosed site. The main gates of the market are locked at night but one wicket gate leading from Dryden Street was always left open. A rolled shutter was pulled down over the windows of the offices at night which was not locked, but the windows were secured by bolts and were so secured on the occasion of all the thefts that occurred except possibly two. The evidence was that on all the occasions mentioned in counts one to seven the cashier of the company had balanced his cash and shortly afterwards, it may be the next day or over the week-end, it was found that an intruder had got into the offices by undoing the bolts, except in the two cases mentioned above when the bolts may not have been fastened. Sums of money were found to be missing and one remarkable feature in each of the cases was that it was only part of the money in the drawer or till which was taken. There was much more that was available for the thief to take, but in each case only comparatively small sums, varying between £1 and £10, were missed, and in one case, I think, though there had been an entry, nothing was taken. Police were on duty at the market, where a messroom was provided for their accommodation, and at stated intervals one officer would relieve the other who was then on duty. The appellant was one of the police officers on that duty. On every occasion that a theft was found to have occurred the appellant had been one of the officers on duty during the period when the entry and theft must have been effected. During a part of the period covered by the counts the appellant had been on leave, and while he was on leave no thefts

1952.
*Jan.* 21 & 29.

FRANK HERBERT HARRIS.

Goddard, L.C.J., Byrne, J., Parker, J.

took place. There was no suggestion that any person who might have been the thief had ever been seen either by the appellant or by any other officer on duty, though, of course, it was possible that someone might have got into the market and out again at night through the wicket gate, and there were other police officers besides the appellant who were on duty during the period.

In view of the continued thefts, it was decided by the detective branch to instal a burglar alarm in Hill's office. This was, of course, concealed, but was a device which would give the alarm as soon as an intruder stepped on the floor-covering of the office. It would cause a signal to be given to the telephone exchange and it was arranged that the operator should at once relay the signal to a post outside the market, where detective officers would be waiting. This alarm was installed on July 11, that is, after the theft mentioned in the seventh count. Thereafter it was arranged that marked money should be left in the till. Nothing happened till the early morning of Sunday, July 22. The previous afternoon, the premises were left locked up and the windows bolted. The marked money was in the till and the alarm set. P.C. Young had been on duty in the market till something before 6 a.m. He had seen no one in the market except the visiting sergeant, nor had he observed anything suspicious, and no alarm was given while he was on duty. The next officer to come on duty was the appellant. He entered the market by the Filey Street entrance, according to his own evidence, just before 6.5 a.m. So there was a short interval when no constable was in the market, but no alarm signal was given in that interval. After being in the messroom for a short time, according to his evidence, the appellant patrolled the market, passing Hill's premises in so doing. At 6.27 a.m. the alarm signal was received at the telephone exchange, and was immediately relayed to the place where two detectives were waiting. They ran to the Dryden Street gate, a distance of 125 yards, and apparently there was some slight difficulty in unlocking the gate. One of the detectives clambered over

1952.
Jan. 21 & 29.

FRANK HERBERT HARRIS.

Goddard, L.C.J., Byrne, J., Parker, J.

the gate or wall and, on doing so, saw the appellant standing at the south end of a narrow passage called a "snicket". This passage led towards Hill's offices. One of the detectives waved to the appellant, who took no notice of him. He said afterwards that he thought they might have been market men, but he apparently made no effort to intercept whoever it was that was entering the market in this unorthodox style on a Sunday morning. The two detectives ran down what is called the "Centre Aisle", one on each side of the offices, which were in the aisle, and a few minutes after reaching Hill's offices they heard running steps and the appellant arrived looking, so they said, pale and agitated. According to his own evidence, he got there from the snicket, which took him past a coalbin in which the marked money was afterwards found. He had previously reached the snicket, as we know from his evidence, by a route which passed Hill's offices. A test was made and it was found that a person could enter the office, put his foot on the floor so as to operate the alarm, take money from the drawer, get out, pull down the shutter, and walk to where the appellant was seen by the detectives in 1 minute 36 seconds. It is, therefore, clear that the appellant must have been either inside, or immediately in the neighbourhood of, Hill's offices when the alarm signal was given. His defence, therefore, amounts to this: That it was a pure coincidence he was found there, or at least at the end of the snicket when the detectives arrived. It was also remarkable that here was another theft exactly similar to the other seven, only part of the money being taken after the entry apparently achieved in the same manner. In this case the exact time of the theft can be ascertained, and at that time the only person known to have been in the market was the appellant. It seems incredible that, had someone else been the thief, the appellant would not have seen him, as he must have been outside or almost outside Hill's premises, if he was not inside them, at the critical moment when the thief, if there was one, would have run out.

Having thus stated the facts, all of which are on the depositions to which the Judge was referred to decide whether

1952.
*Jan.* 21 & 29.

FRANK HERBERT HARRIS.

Goddard, L.C.J., Byrne, J., Parker, J.

all counts should be tried together, the question is: Was he right in holding that the evidence of all the counts was admissible on any one of them? No Court has ever attempted to compile an exhaustive catalogue of the crimes or circumstances in which evidence may be admitted, though it tends to show that the accused has, or may have, committed crimes other than the one on which he is being tried. Probably the only rule that can be laid down is that such evidence must be relevant to an issue raised in the case, whether by the prosecution or by the nature of the defence. To use the words of Lord Sumner in THOMPSON *v.* DIRECTOR OF PUBLIC PROSECUTIONS (13 Cr. App. R. 61, at p. 78; [1918] A. C. 221, at p. 232): "Sometimes for one reason, sometimes for another, evidence is admissible, notwithstanding that its general character is to show that the accused had in him the makings of a criminal: for example, in proving guilty knowledge, or intent, or system, or in rebutting an appearance of innocence which, unexplained, the facts might wear". None of the cases suggest, and we do not suggest, that evidence which establishes nothing more than opportunity to commit other offences is admissible. If, for instance, in the present case the defence had been that the appellant was not in the market when the burglar alarm went off, then in our view the evidence on the first seven counts would not have been admissible.

Mr. Snowden argued that this evidence went to identity, but, in the opinion of the Court, that is not the true ground upon which is was admissible. It is not identity that is here in issue as it was in THOMPSON'S CASE (*supra*). There the question was whether the boys had identified the man to whom they were found speaking in the street as the same man who had previously committed indecencies with them. The appellant's defence was that his appearance at the end of the snicket, just having passed Hill's premises at what must have been, if the jury accepted the evidence, the critical moment, was merely because he was in the course of a patrol which it was his duty to perform. Therefore his appearance there very shortly after the alarm had been given was, as we have already

1952.
*Jan.* 21 & 29.

FRANK HERBERT HARRIS.

Goddard, L.C.J., Byrne, J., Parker, J.

said, a mere coincidence. The evidence was admissible, to repeat Lord Sumner's words, " to rebut the appearance of innocence which, unexplained, the facts might wear ". For this was not the only coincidence. There were indeed a truly remarkable series of coincidences beyond his presence at the critical moment. Another theft at the same premises, at a time when he was on duty, and he had always been on duty during some of the time when the previous thefts had occurred. There were none when he was on leave : the thief entered by the same way as in the previous cases and again only took part of the available money. No one saw the thief, though this was the eighth occasion, and on this the appellant was so near the premises at the critical moment that if the thief had immediately decamped, as he must have done, he would certainly have run into the appellant. We may repeat what this Court said in HALL (*supra*, at p. 177) : " As soon as it becomes clear that the prisoner's defence is that the facts alleged by the prosecution have an innocent and not a guilty complexion, evidence may be given which otherwise might be inadmissible, and it is not the less admissible because it shows, or tends to show, that the prisoner has been guilty of another offence ".

Another point raised in the notice of appeal was that the Judge did not direct the jury to consider each count separately. Perhaps he did not in so many words, but he did go through each count separately and, in any case, it is clear that the jury did, as they acquitted on the first seven and convicted only on the eighth.

There is nothing therefore in that point, and the appeal is dismissed.

*Appeal dismissed.*

---

*Solicitors :* J. Levi, Leeds, for the appellant; Town Clerk, Bradford, for the Crown.

[DIVISIONAL COURT CASE]

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE JONES AND MR. JUSTICE PARKER.

1952.
*Feb.* 7.

## MOWE *v.* PERRATON.

*Road Traffic—Taking and Driving Away Motor Vehicle without Owner's Consent—Master and Servant—Unauthorised Use by Servant During Period of Employment—Road Traffic Act*, 1930 (20 & 21 *Geo.* 5, *c.* 43), *s.* 28.

Where a servant, who is employed to drive his master's motor vehicle, during the period of employment makes an unauthorised use of the vehicle for the purpose of some frolic of his own, he does not thereby become guilty of the offence of taking and driving away a motor vehicle without the consent of the owner, inasmuch as he was in lawful possession of the vehicle before he started on his unauthorised journey.

Case Stated by the Appeal Committee of West Kent Quarter Sessions.

At a Court of summary jurisdiction at Bromley an information was preferred by Reginald Perraton, a police officer (" the prosecutor "), charging John Clifford Mowe (" the defendant ") with taking and driving away a motor vehicle without the consent of the owner or other lawful authority, contrary to section 28 of the Road Traffic Act, 1930. The magistrates convicted the defendant who appealed to West Kent Quarter Sessions, where the following facts were established.

The defendant was the driver of a lorry which belonged to the Road Haulage Executive and was under hire to the Royal Army Service Corps at Woolwich Arsenal. The defendant's duty, after he had finished work, was to drive the lorry back to a garage at Woolwich Dock. On the day of the alleged offence the defendant, after leaving Woolwich Arsenal, drove

1952.
*Feb.* 7.

MOWE *v.* PERRATON.

Goddard, L.C.J., Jones, J., Parker, J.

to his own home, where he picked up a radiogram and set out in the lorry with the intention of taking the radiogram to the house of a relative and then driving the lorry to the garage. He was stopped by the police after he had left his house. Quarter Sessions allowed the appeal, and the prosecutor appealed to the Divisional Court.

*J. H. Buzzard*, for the prosecutor.
*John Gower*, for the defendant.

THE LORD CHIEF JUSTICE: This is a Case Stated by the Appeal Committee of the West Kent Quarter Sessions, before whom one John Clifford Mowe was charged with an offence against section 28 of the Road Traffic Act, 1930, in that he "did take and drive away a motor vehicle . . . without the consent of the owner or other lawful authority".

The respondent was the driver of a lorry which belonged to the Road Haulage Executive and was under hire to the R.A.S.C. at Woolwich Arsenal; and when he had finished work at Woolwich Arsenal he had to drive it back to the garage at Woolwich Dock. On the day of the alleged offence he did a thing he ought not to have done so far as the relationship of master and servant was concerned. He first of all drove the lorry to his house, where he picked up a radiogram. From his home he set out in the lorry with the intention of taking the radiogram to the house of a relative and then driving the lorry back to the garage at Woolwich Dock. His employment required him to drive the lorry where it was needed in the day and then to Woolwich Dock at night, but he proceeded to go on what is called a frolic of his own, that is to say, his journey was not an authorised journey. I am far from saying that that is not a matter to be strongly deprecated, because, if when he was on a frolic of his own an accident had happened, in all probability the policy of insurance would not have covered that accident. If he had been charged with driving an uninsured vehicle, I dare say he might have been convicted. But to say that such conduct

1952. *Feb.* 7.

MOWE *v.* PERRATON.

Goddard, L.C.J., Jones, J., Parker, J.

amounts to taking and driving away a motor vehicle without the consent of the owner within section 28 of the Act of 1930 seems to me wrong. This section was intended to deal with a case where a person takes a motor-car which does not belong to him, drives it away and then abandons it, because it is difficult in such a case to say that the person who took the vehicle intended to deprive the owner permanently of the possession. This is a case of a man who took and drove a motor vehicle during his work. What he did was an unauthorised thing, but that does not make the taking or the driving away a criminal offence under section 28.

I think it is only necessary to state the facts to show that Quarter Sessions came to a perfectly right decision and in my opinion this appeal fails and must be dismissed with costs.

JONES, J.: I agree.

PARKER, J.: I agree.

*Appeal dismissed.*

*Solicitors:* The Solicitor, Metropolitan Police, for the appellant; Beech & Taylor, for the respondent.

[CENTRAL CRIMINAL COURT]

BEFORE

MR. JUSTICE MCNAIR.

1952 *Feb.* 14, 18.

## REG. *v.* TRONOH MINES, LTD., BARRENGER AND THE TIMES PUBLISHING CO.

*Corrupt Practice—Parliamentary Election—Incurring of Expense—Advertisement in Newspaper—General Propaganda in Support of Political Party—Alleged Intent to Promote or Procure*

1952.
*Feb.* 14, 18.

REG. *v.* TRONOH MINES, LTD., BARRENGER AND THE TIMES PUBLISHING CO.

McNair, J.

*Election of Particular Candidate—Representation of the People Act*, 1949 (12, 13 & 14 *Geo.* 6, *c.* 68), *s.* 63 (1).

Section 63 (1) of the Representation of the People Act, 1949, prohibits the incurring of expenses, with a view to promoting or procuring the election of a candidate at an election, by any person other than the candidate, his agent, or those authorised by his agent " on account (*a*) of holding public meetings . . . ; or (*b*) of issuing advertisements . . . ; or (*c*) of otherwise presenting to the electors the candidate or his views or the extent or nature of his backing, or disparaging another candidate . . . ".

The above section prohibits the incurring, with the effect of supporting a particular candidate in a particular constituency, expenses of the categories therein specified which, if authorised by his agent, would form part of the election expenses for the constituency and thus be subject to the statutory maximum. It does not prohibit expenditure, the real purpose of which is general political propaganda, even though such propaganda may incidentally assist a particular candidate against others.

Trial before McNair, J., at the Central Criminal Court.

The defendants, Tronoh Mines, Ltd., H. E. Barrenger, secretary of the company and an associated group of companies, and the Times Publishing Company, Ltd., were indicted at the Central Criminal Court on February 14 and 18, 1952, for unlawfully incurring expense on October 19, 1951, on account of issuing in *The Times* an advertisement entitled " Tronoh-Malayan Tin Group of Companies. Interim Statement on Dividend Limitation ", with a view to promoting or procuring the election of a candidate at the General Election—namely, the election of a candidate other than the Socialist candidate in the constituency of the Cities of London and Westminster on October 25, 1951, contrary to section 63 of the Representation of the People Act, 1949. On a second count the defendants were charged with a similar offence on the same date with a view to promoting or procuring the election of the Conservative candidate in the same constituency.

The advertisement in question contained the following statements: " In view of the recent announcement by the

1952.
*Feb.* 14, 18.

REG. *v.* TRONOH MINES, LTD., BARRENGER AND THE TIMES PUBLISHING CO.

McNair, J.

Chancellor of the Exchequer, embodied in the ' White Paper ', Cmd. Paper 8318, entitled ' Control of Dividends ', and of the fact that our annual meetings are not held until towards the end of the year, it is thought to be desirable now to address you regarding these iniquitous proposals ".

Further down the column the statement continued: " The object of this Interim Statement, therefore, is to indicate:— 1. The very serious implications and probable consequences of the present Government's policy. 2. The serious damage to all private enterprise generally, and to the Tin and Rubber Industries of Malaya particularly ", and again, under the heading, " Outcome of Socialist Theories ", it continued:— " It is relevant and instructive to examine the reasons why, after six years of Socialist rule, the country is in such a parlous state that the present Government considers these proposals to be expedient. One has only to read Mr. Attlee's remarks in his book (published in 1937) ' The Labour Party in Perspective ':—' The plain fact is that a Socialist Party cannot hope to make a success of administering the Capitalist system because it does not believe in it '. Mr. Attlee's policy is to wreck a tried and proved economic system without putting anything in its place ".

Under the heading " The City ", the advertisement continued:—" But see what Mr. Attlee's opinion is regarding the City of London, which has been the centre of world finance, trusted and respected for generations. In his book, under the heading ' Finance ', he writes:—' First in importance is financial power. Over and over again we have seen that there is in this country another power than that which has its seat at Westminster. The City of London, a convenient term for a collection of financial interests, is able to assert itself against the Government of the country. Those who control money can pursue a policy at home and abroad contrary to that which has been decided by the people '.

" What a graceless and undignified thing for a Prime Minister to say and publish to the world, of one of the finest financial institutions in the world—and British at that—that

the City of London is a convenient term for a collection of financial interests, especially when he has so little experience of any business or commercial undertaking, a defect which he shares with so many of his Cabinet colleagues. The coming General Election will give us all the opportunity of saving the country from being reduced, through the policies of the Socialist Government, to a bankrupt Welfare State ".

Evidence was given (1) by the Conservative agent for the constituency to prove that the expenditure on the advertisement was not authorised by him, (2) by the returning officer for the constituency, (3) by the managing director of a firm of advertising agents to prove the preparation of the advertisement by Mr. Barrenger and the acceptance of it by *The Times* for the cost of £800 and (4) by a police superintendent who served the summonses. Submissions were then made on behalf of all the defendants that there was no case to go to the jury.

*Rodger Winn* (*H. E. Perkins* with him), for Tronoh Mines, Ltd., and Barrenger:

The proper way to construe the prohibition of expenses under section 63 of the Act is that it is a prohibition against presenting to the electors a particular candidate or his views. The whole of the legislation under consideration is concerned with the control of a candidate's expenses in the course of his election campaign. Its object is to ensure that no more than a prescribed amount shall be spent by or on behalf of a particular candidate and that other persons shall not intervene to shoulder the burden of part of the expenses which should properly fall on the candidate, thereby obtaining for him an unfair advantage over his opponent. In section 63 (1) " election " means election in a particular constituency; that is common ground. If the prohibition is given the wider and more comprehensive meaning contended for by the Crown in this case, the result must be that it will be impossible to make an accurate return of the expenses in different constituencies of an advertisement inserted in a national newspaper. The

1952.
*Feb.* 14, 18.

REG. *v.* TRONOH MINES, LTD., BARRENGER AND THE TIMES PUBLISHING CO.

McNair, J.

candidate has to make a declaration with regard to expenses on the prescribed form and such declaration has to be true and accurate. The provisos to the subsection allow proprietors of newspapers to spend money on publishing their views with the object of influencing a particular election, and it would be an anomalous result if the publication of an advertisement in all constituencies was at the same time forbidden. The issue is whether, it having been shown that there was a general intent of a global character, that affords any evidence of a specific intent in relation to each constituency, and it is submitted that it does not.

*Gerald Howard*, Q.C. (*J. M. G. Griffith-Jones* with him), for the Times Publishing Co. :

The argument for the co-defendants is adopted on behalf of this defendant. Expenses as defined in section 63 do not mean expenses incurred in general political propaganda, even though such propaganda may incidentally help the candidate of a particular constituency. Such expenses are not " election expenses ". The true test of the matter is whether an expense incurred for the promotion or procurement of a candidate is propaganda of a general political view, or an expense for propaganda specifically directed to the candidate at the particular election. Only the latter can be an election expense. The Crown is obliged to do more than merely show that in the ordinary course of a national newspaper's business its pages contained an anti-Socialist advertisement. It is necessary further to show that in some way it was used in a particular constituency with the particular view of helping the candidate in that constituency. Neither the Act of 1949 nor the Act of 1918 altered the definitions in law of the kind of expenses which may be incurred. The Legislature has been increasingly setting its face against the incursion in any constituency of propaganda specially directed to promote or procure the return of a particular candidate in that constituency. There are serious practical difficulties in adoption of the Crown's contention for the construction of section 63. How could the expense of the advertisement be shown as an

election expense? Any attempt to apportion it between constituencies must be merely guess-work.

[MCNAIR, J.: If the Crown's construction is right and the defendants have been guilty of a corrupt practice, does that involve the candidate if he knows of the corrupt practice? Suppose he reads *The Times* and sees this advertisement and also knows that his election agent has not given any authority? I have at the back of my mind a rule which says that the candidate must make a declaration that he does not know of any corrupt practice having been committed in respect of his election.]

Yes, that must be so. Further, there is no evidence that *The Times* had the special view of promoting or procuring the election of the Conservative candidate for the Cities of London and Westminster. The Crown has not suggested that there was any direct evidence. The jury are being invited to presume first, that it was the intention of *The Times* to help anti-Socialist candidates generally, and then to presume from that natural and probable consequence of the defendants' act another natural and probable consequence, namely, the intention to help a particular candidate. The Crown is not entitled to go so far, and the second stage is clearly too remote.

[MCNAIR, J.: You might say, if you are right in your construction of the section that the promoting and procuring relates to a particular election, that specific intent to promote the candidate at that election must be proved, and cannot be proved merely by proof of a general intent?]

That is a concise summary of my argument on this point. There is no positive evidence to prove this special intent. Further, since no person can aid and abet an act involving *mens rea* unless he knows the nature of the act, in order to prove that *The Times* was aiding and abetting, the Crown would have to show that they knew or deliberately refrained from knowing that no authority had been given for the advertisement.

1952.
*Feb.* 14, 18.

REG. *v.* TRONOH MINES, LTD., BARRENGER AND THE TIMES PUBLISHING CO.

McNair, J.

*Christmas Humphreys* (*J. S. Bass* with him), for the Crown:

The whole basis of section 63 is the expenditure of money, and the purpose of the section is to stop rich partisans, as distinct from a candidate, buying space for advertisements and to prevent outsiders from spending money to the advantage of their party's candidate and to the disadvantage of a less wealthy party's candidate. The advertisement under contention must have gone into every constituency and inasmuch as it was expense incurred on behalf of a political party on the eve of an election, it was expense incurred on behalf of every candidate supporting that party. The words "election expenses" at the heading of section 63 are a generic heading for the matters referred to in the sections following. The purpose, however, of section 63, as distinct from that of the sections following, is to go wider than the candidate himself and to provide that no expense with a view to promoting the election of a candidate should be incurred by any person. It is conceded that there is no direct evidence of intent against *The Times*, but the Crown relies on inference of intent.

[McNAIR, J.: You say the facts show intent to influence the electors. Is that sufficient to establish the special intent charged in this indictment?]

Yes, because the greater must include the less. It is impossible to support a party just before an election without supporting every candidate supported by that party. It is sufficient that there is evidence on which a jury can infer that *The Times*, though they may have had no intent themselves, knew that the Tronoh Mines Co. had the intent, because in that event they could be aiding and abetting the principal offenders.

McNAIR, J.: The view which I take of the construction of section 63 of the Act is such that, in my opinion, there is no case I can properly leave to the jury. Counsel for the defendants has submitted that no reasonable jury could, on the evidence produced by the Crown, reach a conclusion that the particular facts charged have been proved. On the view which

I take of the proper construction of the Act, the submission of the defence is, in my opinion, right, and I shall direct the jury to return a verdict of Not Guilty against each of the defendants on both counts of the indictment.

Since I have been told that this is by way of being a test case, and it is desired to have some judicial ruling on the construction of the section of the Act under which the charge was brought, it is right that I should indicate why I have decided to take that course.

For the purpose of these observations I assume that the jury could properly find, on the evidence that has been put before them, that the object or the primary object of the incurring of the expenditure in question was to advance the prospect of the anti-Socialist case generally, that those who incurred the expense had in mind the particular General Election, and that they desired to achieve that object by procuring the election of a majority of candidates who were against the Socialist Government, although, if the matter had been left to them, the jury might well have taken the view that this was not the object or the primary object.

The charges were brought under section 63 of the Representation of the People Act, 1949—a consolidating statute. Counsel for the defence submitted that on the proper construction of that section the evidence tendered by the Crown did not present any act prohibited by it. Alternatively, they submitted that there was no evidence of any act prohibited by the section on any reasonable construction of it. The section prohibits the incurring of expenses by any person other than the candidate, his agent, or those authorised by his agent " on account (*a*) of holding public meetings . . . ; (*b*) issuing advertisements . . . or (*c*) of otherwise presenting to the electors the candidate or his views or the extent or nature of his backing, or disparaging another candidate . . .".

It seems to me that the words " of otherwise presenting to the electors the candidate or his views " necessarily import that the items specified in paragraphs (*a*) and (*b*), if they are to be caught by the prohibition, must also be items that have the

1952.
*Feb.* 14, 18.

REG. *v.* TRONOH MINES, LTD., BARRENGER AND THE TIMES PUBLISHING CO.

McNair, J.

effect of presenting to the electorate the candidate or his views, or the extent or nature of his backing, or of disparaging another candidate. If this result was not intended, it seems to me that paragraph (*c*) should have run: " of presenting to the electors whether by means specified in paragraphs (*a*) or (*b*), or in any other way, the candidate or his views ". Further, notwithstanding that the Interpretation Act, 1889, s. 1 (1) (*b*), provides that, unless the contrary intention appears, words in the singular shall include the plural, I think that the context here does necessarily require that the reference to the election of a candidate at an election means a candidate at a particular election, not elections generally.

On the whole, therefore, although I quite appreciate that the point is arguable, I am of opinion that the submission of the defence on that point is correct as a matter of construction. It is not necessary in a criminal case such as this to go to that length. It is sufficient, in my judgment, to say that it is a reasonable and possible construction. The Lord Chancellor said in a recent case: " No man is to be put in peril on an ambiguity."

I have reached the conclusion that no reasonable jury on the evidence could find that the advertisement in question was an advertisement presenting to the electors of any constituency any particular candidate still less presenting to the electors of the constituency of the Cities of London and Westminster the Conservative candidate, or any anti-Socialist candidate, or his views.

The fact that the section provides no mode by which an advertisement in a national newspaper, circulating generally throughout the country, supporting the views of a particular party and not the views of a particular candidate, can be authorised lends strong support to the view that this particular form of advertisement is not prohibited. The form " W " on which the agents make their returns of election expenses is, it is quite clear to me, inappropriate for making a return of expenses of the kind with which we are concerned in the present case.

There is no way in which expenditure relating to all elections can be apportioned for the purpose of any particular return for any particular election. That alone seems to lend strong support to the view that the section was not intended to prohibit expenditure incurred on an advertisement designed to support, or having the effect of supporting, the interest of particular parties generally in all constituencies, at any rate at the time of a General Election, and not supporting a particular candidate in a particular constituency. I think that the same conclusion is reached when one considers the structure of the group of sections (60 to 78) in which section 63 appears. The group is headed by the phrase " election expenses ". These words are to be regarded as forming part of the statute itself, and they may, at any rate in cases of doubt, but, I think, in all cases be used to provide the key to the general construction of each section following that heading.

Election expenses are defined in section 103 as " expenses incurred, whether before, during, or after the election, on account of or in respect of the conduct or management of the election ". By section 171 (1) " election " here means a particular election. " Parliamentary election " is defined by section 17 (1) of the Interpretation Act, 1889, which makes it quite clear that it means an election for a particular constituency and not the totality of those elections which is commonly known as a General Election. Accordingly, it seems to me that this group of sections is dealing with an election for a particular constituency. In other words, what is prohibited by section 63 is the incurring of expenses of one of those particular categories which has the effect of supporting a particular candidate in a particular constituency, which, if authorised by the election agent, would form part of the election expenses for that constituency and thus be subject to the statutory maximum of expenditure for that constituency.

Accordingly, I accept the submissions advanced by Mr. Howard that section 63 does not prohibit expenditure the real purpose or effect of which is general political propaganda, even though that general political propaganda does incidentally

1952.
*Feb.* 14, 18.

REG. *v.* TRONOH MINES, LTD., BARRENGER AND THE TIMES PUBLISHING CO.

McNair, J.

assist a particular candidate against others. There have been cases where there has been a particular incursion by a party or body into a particular election, but there is no evidence or suggestion of anything of the kind here. Certain of the cases to which I have been referred (including the KENNINGTON CASE (1886), 4 O'M. & H. 93, and the HAGGERSTON CASE (1896), 5 O'M. & H. 68) draw this distinction, and, although those were decisions on the earlier Acts, it does not seem to me that in any relevant respect their validity has been altered by the Acts of 1918 or 1948 or the consolidating Act of 1949.

I have come to the conclusion that no reasonable jury could find that the expenditure in question was prohibited on this construction of the Act. That being so, I need not pause to consider the special position of the third defendants, The Times Publishing Co., and the question whether, on any view of the statute, it could be said that there was any evidence against them. Furthermore, it seems to be that the conclusion which I have reached on the general construction of the section renders it unnecessary for me to express any final view on the question whether the proof of intention, object, or view of promoting or incurring the election of candidates generally of one particular party or opposing one particular party in all elections held at a General Election, could ever be sufficient evidence, on which a jury might act, of specific intent such as was charged in this case—intent to promote or procure the election of a particular candidate or candidates at a particular election. Having listened to the arguments on that point, I am strongly of the opinion that in a case such as this it would be necessary to prove specific intent related to the particular election, but I express no final view upon that.

[On the Judge's direction the jury brought in a verdict of Not Guilty on both counts against each of the three defendants, and they were discharged.]

---

*Solicitors:* Stephenson, Harwood & Tatham, for the first and second defendants; Charles Russell & Co., for the third defendant.

*Monday, February* 25, 1952.

## STATEMENT BY THE LORD CHIEF JUSTICE AS TO PROBATION ORDERS

THE LORD CHIEF JUSTICE: It so happens that in the list today there are quite a number of cases in which the Court will have to consider either the making of probation orders or cases in which breaches of probation orders have been alleged. It will therefore be convenient if I call attention to a matter which has been brought to the notice of the Court by Devlin, J., and to which I hope wide publicity will be given.

The form of probation order which is being used, not only in Courts of summary jurisdiction, but in Courts of quarter sessions and Courts of assize, is a printed form and, after reciting the circumstances and so forth, the form says: "It is therefore ordered that the defendant, who resides in the Petty Sessional Division of (blank) be required for the period of" whatever the Court thinks fit "next ensuing to be under the supervision of a probation officer appointed for or assigned to that Division"; and then—and this is the point—"it is further ordered that the defendant shall during the said period comply with the following requirements:—(1) that he shall lead an honest and industrious life; (2) that he shall notify forthwith to the probation officer any change of his residence or employment; (3) that he shall keep in touch with the probation officer in accordance with such instructions as may from time to time be given by the probation officer; and, in particular, that he shall, if the probation officer so requires, receive visits from the probation officer at his home". Then there is a further space for any further conditions which the Court may think fit to impose.

This form is taken from the Schedule to some Summary Jurisdiction Rules which were brought into force by Statutory

Instrument No. 1405 of 1949 directly after the Criminal Justice Act came into force; but on a reference to that form it will be seen that those three conditions I have just mentioned are printed in italics, and that shows that they are put in as specimens of the requirements which the Court can make. They have been treated in this printed form, which I suppose is supplied to all Courts, as though those conditions were part of the statutory form, but they are not. The matter becomes quite clear when one regards section 3 of the Criminal Justice Act, because if the Court simply says that it makes a probation order the effect is an order requiring the probationer to be under the supervision of a probation officer for a period to be specified in the order of not less than one year nor more than three years. If the Court desires to impose other conditions—and I am far from saying it is not very desirable that they should impose conditions with regard to changes of address and so forth—the Court must specially impose them, and not only specially impose them but the nature of them has to be explained to the probationer under subsection (3) and subsection (5) of section 3 of the Act. It cannot be taken that in every case automatically these provisions, which, as I say, have only been set out in the specimen order as suggestions or specimens of the sort of requirements that the Court can make, are to be made a part of the order.

In the case to which I have specially referred, which has been brought to the attention of the Court by Devlin, J., a probationer was brought before him and the breach of probation alleged was that he had not intimated to the probation officer his change of address. Devlin, J., made inquiries and found that the learned Judge who had made the order had simply said he made a probation order and had not imposed any particular condition. Therefore the learned Judge held, and, if I may say so, we think quite rightly, that the conditions had no effect.

I do not want it to be thought that the Court is for one moment saying that these conditions—except one which I will

mention in a moment—are not very proper conditions to impose when making a probation order, but for the reasons I have given they must be imposed by the Court if they are to be effective, and they have to be, as I say, explained to the probationer at the time when they are imposed. I hope, therefore, that all Courts, both of summary jurisdiction and quarter sessions, will remember this; and if they desire to impose conditions as to notifying the probation officer of any change of address and keeping in touch, as it is put " with the probation officer in accordance with such instructions as may from time to time be given by the probation officer " and to receive visits from the probation officer at his home, if those are to be conditions of the order they must be imposed at the time the order is made and their effect must be explained to the probationer.

The Court, however, considers that the first of the conditions printed in this order, that " he shall lead an honest and industrious life ", requires further consideration. In the first place, it is an extremely vague condition to impose and it must raise difficulties for this reason: so far as leading an honest life is concerned, what does that mean? Under section 8 of the Act, if the probationer commits another offence while he is on probation the Act itself provides the consequences that are to follow. Therefore the only construction that one can give to a condition that he should lead an honest life would apparently be that he shall not do something which does not amount to a criminal offence, and that would be a very difficult thing for the Court to deal with. It would be far better, I think, if any term of that sort is to be imposed, that the well understood condition should be imposed, that he should be of good behaviour and keep the peace. We cannot think that the condition that he should lead an honest and an industrious life, considering the provisions of section 8 of the Act, is at all a satisfactory provision to put into the order, and it should be understood that this provision that he should

lead an honest and industrious life, which is apparently copied from this specimen form set out in the order, is not a statutory requirement.

I hope, therefore, that notice will be taken of what the Court has said so that there may not be the difficulty which has arisen in the case to which I have referred at Derbyshire Assizes.

# GENERAL INDEX

ADMISSIBILITY OF EVIDENCE,
time for deciding, 62

ADVERTISEMENT,
general election, 196

AGE,
proof of, 155

AGENT,
obtaining from, 24

ANTECEDENTS,
evidence of, 33

ATTEMPT,
to commit crime, 130

BAIL,
appeal to quarter sessions, 8
previous convictions, 8

BAILEE,
larceny from, 1

BORSTAL TRAINING,
committal to quarter sessions, 155
conviction before magistrates, 135

BREAKING AND ENTERING,
evidence of similar transaction, 185
recent possession, 69

BUGGERY,
wife a competent witness, 183

BUILDING,
being found by night in, 57

CHARACTER,
evidence of general, 61
of prisoner, 108

CHARGEABILITY
of bailee, 1

CHILD,
corroboration of, 48
indecent invitation to, 180
under eight, 94

COMMITTAL
for sentence, 8, 20, 155

COMMON LAW MISDEMEANOUR, 130

COMPETENCY OF WITNESS, 183

COMPANY,
committal for trial, 29

CONDITIONAL DISCHARGE,
fine not to accompany, 22

CONSECUTIVE SENTENCES, 12

CONSPIRACY,
to commit new statutory offence, 37
sentence for, 121

CONSTITUTION OF COURT, 30

CONVICTION,
precedent to corrective training, 12, 125

CONVICTIONS QUASHED, 37, 57, 76, 108, 113, 180

CORRECTIVE TRAINING, 12, 93, 125

CORROBORATION,
false statement by prisoner, 48

CORRUPT PRACTICE, 196

CROSS-EXAMINATION
on previous convictions, 108

DEFENCE,
nature of, 108, 167, 185

DISCREDITING WITNESS, 80

DRIVING AWAY
of motor vehicle, 100

ELECTION EXPENSES, 196

EVIDENCE,
discrediting witness, 80
of general character, 61
of similar transaction, 62
time for deciding issue of admissibility, 62

FALSE PRETENCES,
obtaining for another person, 113
obtaining from agent, 24

FALSE STATEMENT,
capability of affording corroboration, 48

FINE,
not to accompany conditional discharge, 22

GROSS INDECENCY,
conviction of one party, 17
evidence of similar acts, 167
summing-up, 17
where indecent assault cannot be proved, 180

IDENTIFICATION,
on committal for sentence, 20

IDENTITY,
issue of, 167

INDECENT ASSAULT,
circumstances constituting, 128, 138, 180

INDICTABLE OFFENCE, 135

INDICTMENT
false pretences, 24, 113
new offence not triable on, 37

INVOLUNTARY ACT, 108

KNOCK-OUT AUCTION, 37

LARCENY,
by owner from bailee, 1
property acquired from child under eight, 94

MISCARRIAGE OF JUSTICE,
no substantial, 141

MOTOR VEHICLE,
driving away without owner's consent, 100, 194

NEWSPAPER,
advertisement in, 196
reference to previous convictions, 72

NO SUBSTANTIAL MISCARRIAGE OF JUSTICE, 141

NOTICE OF INTENDED PROSECUTION, 102

OFFENCE,
newly created by statute, 37

OUTSTANDING OFFENCES, 33

OWNER,
larceny by, 1

PARLIAMENTARY ELECTION,
incurring of expenses, 196

POST,
sending of notice by, 102

PREVIOUS CONVICTIONS,
cross-examination on, 108
ground for refusing bail, 8
newspaper report of, 72
qualifying for corrective training, 125

PROBATION ORDER,
effect of, 125
form of, 207

PROPAGANDA,
general political, 196

PROVISO,
application of, 141

PURCHASE TAX,
fraudulent evasion of, 62

QUARTER SESSIONS,
refusal to pass sentence, 155

RECEIVING,
count not to be left to jury, 76
from child under eight, 94

RECENT POSSESSION, 69

RING,
agreement to form, 37

SEAL,
on order committing company for trial, 29

SENTENCE,
attempt to commit crime, 130
Borstal training, 135
concurrent, 136
consecutive, 12
conspiracy, 121
corrective training, 12
imprisonment exceeding two years, 130
reduced, 130
supervision order, 93, 153
varied, 12, 125

SEPARATE TRIAL, 167, 185

SERVANT,
frolic by during work, 194

SIMILAR TRANSACTION,
evidence of, 62, 167, 185

SPECIAL PROPERTY,
in goods, 1

SPOUSE,
whether a competent witness, 183

STAMP,
of Court, 29

STATEMENT
by prisoner implicating co-prisoner, 80

STATUTE,
mode of trial presented by, 37

SUMMING-UP,
attempted murder, 141
breaking and entering, 69
evidence of similar transactions, 167, 185
gross indecency, 17, 167
indecent assault, 180
larceny and receiving, 76
misdirection in law, 141
statement implicating co-prisoner, 80

SUPERVISION ORDER, 93, 153

TIME,
computation of, 102

TRANSCRIPT,
when to be allowed, 113

TRIAL JUDGE,
member of Court, 30

UNAUTHORISED JOURNEY,
by driver, 194

UNSWORN EVIDENCE,
corroboration of, 48

VERACITY,
lack of reputation for, 80

WIFE,
competency as witness, 183

WITNESS,
competency of, 183

BIBL
LONDON
UNIV

PRINTED IN GREAT BRITAIN
BY
THE EASTERN PRESS LTD.
LONDON AND READING